Supreme Court, U.S.
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No.

In the Supreme Court of the United States

MICHELLE BAZZETTA, ET AL.,
Petitioners,

v.

KENNETH McGINNIS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHERE THIS COURT DID NOT GRANT CERTIORARI ON THE ISSUE, THE PARTIES DID NOT BRIEF THE ISSUE AND THE DECISION DID NOT ADDRESS THE LOWER COURT'S RULING ON PETITIONERS' PROCEDURAL DUE PROCESS CLAIMS, DID THE SIXTH CIRCUIT ERR IN HOLDING THAT *OVERTON* 'IMPLICITLY' OVERRULED THE LOWER COURT'S RULING ON PROCEDURAL DUE PROCESS?

II. WHERE THE USE OF VISITING RESTRICTIONS AS PUNISHMENT FOR PRISONERS CAN RESULT IN THE PERMANENT LOSS OF ALL FAMILY VISITS, DOES THE IMPACT ON THE PETITIONERS' FUNDAMENTAL RIGHTS TO INTIMATE ASSOCIATION AND THE FACT THAT THE PUNISHMENT IS ATYPICALLY SEVERE IN MICHIGAN REQUIRE FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS PROTECTIONS?

PARTIES TO THE PROCEEDING

Petitioners are a certified class of incarcerated citizens together with their family members who challenged a permanent ban on all visitation based on two or more misconduct tickets for substance abuse. Respondents are the Michigan Department of Corrections and its Director.

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OPIN NS AND PROCEEDINGS BELOW

Petitioners respectfully petition this Court to issue a writ of certiorari to review the ruling of the United States Court of Appeals for the Sixth Circuit, entered on November 28, 2005. *Bazzetta v. McGinnis*, 430 F.3d 795 (6th Cir. 2005), App. 3a. Plaintiffs' Petition for Rehearing with Suggestion for En Banc review of this decision was denied on March 9, 2006, App. 1a. The Court of Appeals' decision reversed the ruling of the United States District Court for the Eastern District of Michigan issued February 11, 2004, App. 24a.

This Court previously granted certiorari to respondents in this case to address the questions of whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments; whether restrictions on visitation imposed were reasonably related to legitimate penalogical interests; and whether the restriction on visitation constituted cruel and unusual punishment in violation of the Eighth Amendment. *Overton v. Bazzetta,* 537 U.S. 1043 (2002), App. 53a. This Court did not grant certiorari to review the district court's independent ruling that the manner in which respondents imposed the permanent visitation restrictions on petitioners was violative of their procedural due process rights. This Court also declined to interfere with the district court's removal of petitioners' permanent visitation restrictions until Michigan developed a plan for basic procedural due process protections. *Overton v. Bazzetta*, May 17, 2002, Denial of Motion to Revoke the Mandate and Stay Proceedings. This Court's decision ruling that Michigan's visitation rules, including the permanent restriction on visits for substance abuse misconducts, did not violate Plaintiffs' First or Eighth Amendment rights, did not address the district court's ruling and injunction requiring Michigan to provide basic procedural due process protections

prior to imposing the permanent visitation ban on petitioners. This Court's decision on these issues is reported at *Overton v. Bazzetta*, 539 U.S. 126 (2003), App. 32a.

Upon remand, the Sixth Circuit denied respondent's motion for peremptory reversal of the district court's injunction and remanded the case to the district court in light of *Overton*. *Bazzetta v. McGinnis*, 73 Fed. Appx. 842 (6th Cir. 2003), App. 27a, and *Bazzetta v. McGinnis*, 79 Fed. Appx. 151 (6th Cir. 2003), App. 30a. The district court, relying upon its prior findings, ruled that petitioners were entitled to procedural due process protections prior to respondent's reimposition of permanent visitation restrictions, App. 24a. The Sixth Circuit accepted an interlocutory appeal to review the respondents' claims that *Overton* precluded recognition of petitioners' right to due process protections in connection with visitation restrictions. June 10, 2004 Order, *Bazzetta v. McGinnis*, App. 21a.

The Sixth Circuit reversed the district court ruling based on its belief that *Overton* implicitly foreclosed petitioners' procedural due process rights, App. 3a.

JURISDICTION

Petitioners seek review of the amended opinion of the United States Court of Appeals for the Sixth Circuit entered on November 28, 2005. *Bazzetta v. McGinnis*, 430 F.3d 795 (6th Cir. 2005), App. 3a. The Sixth Circuit denied petitioners' request for rehearing and en banc review on March 9, 2006, App. 1a. This Court has jurisdiction to review the November 28, 2005 opinion of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV provides that:

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Michigan Department of Corrections' Administrative Rule 791.6609 provides, in pertinent part:

R 791.6609 Limits on Visitation

> (11) the director may permanently restrict all visitation privileges, except with an attorney or member of the clergy, for a prisoner who is convicted of or found guilty of any of the following:

(d) two or more violations of the major misconduct charge of substance abuse;

(12) the director may grant reconsideration and removal of a permanent visitor restriction of all visitation privileges that is imposed pursuant to this subrule (11) of rule.

STATEMENT OF THE CASE

1. Factual Statement

Petitioners, a certified class of Michigan prisoners and their family members, filed a civil rights action in August 1995 challenging a number of new restrictions on visitation. One rule, relevant to the instant petition, allows for the issuance of a permanent ban on all visitation (except with clergy and attorneys) for prisoners receiving two or more substance abuse misconducts. Petitioners challenged the rule as a violation of their rights of association under the First and Fourteenth Amendments and asserted that the punishment of severing all visitation with family was cruel and unusual punishment in violation of the Eighth Amendment.

Petitioners also asserted that the manner in which the Department had imposed the ban on them was so arbitrary, capricious and lacking in any criteria or process as to constitute a violation of their procedural due process rights under the Fourteenth Amendment.

In its 2001 decision after trial on the merits, the district court held that the permanent restriction on visitation violated petitioners' First Amendment right of association and

constituted cruel and unusual punishment in violation of the Eighth Amendment. The district court also found the process by which respondents had implemented the permanent ban on visitation violated petitioners' procedural due process rights. Bazzetta v. McGinnis, 148 F.Supp.2d 813, 858 (2001). ("The inconsistency and uncertainty of enforcement and the failure to provide any opportunity to be heard are all procedural deprivations of constitutional dimension").

The district court identified a wide array of procedural problems associated with the implementation of the permanent ban on visitation that resulted in inconsistent, arbitrary and unchallengeable decisions to indefinitely restrict visitation between spouses, parents, children and siblings. The district court found that indefinite visitation restrictions were imposed without notice of the existence of the rule prior to imposing the punishment; without any written criteria regarding when, and upon whom, the ban would be imposed resulting in selective and arbitrary punishments; without any opportunity for petitioners to have a hearing before imposition of the ban; without any procedure for appealing or challenging the ban; and without any standard criteria or review procedures for removing the ban. *Bazzetta*, 148 F.Supp.2d at 836, 839-44. From August 1995 through December 1999, 1,576 petitioners had been placed on permanent bans without any due process. *Bazzetta*, 148 F.Supp.2d at 842.

While the regulation permits the MDOC director to remove the restriction after two years, as the district court found, "the two-year time frame...is a threshold, not a cap." *Bazzetta*, 148 F.Supp.2d at 839. The court went on to hold:

> Although the regulations provide for the possibility of review after two years, there are many instances where no such review occurs, or where reinstatement

> of privileges after two years is denied. As of the date of trial, over half of the restricted prisoners had been on the permanent ban for more than twenty-seven months; a significant number had been restricted for over three and a half years. *Id.* at 858.

The majority of those placed on the ban in 1995 were still on a permanent restriction five years later without any mechanism available for having the ban lifted. *Id.* at 842.

The district court's decision was affirmed on appeal. *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002). On May 16, 2002 the district court enjoined respondents from continued implementation of the permanent ban and ordered reinstatement of petitioners' visitation. This Court on May 17, 2002, denied respondents' request for a stay of the injunctive order. Respondents filed a petition for writ of certiorari which did not request review of the lower court procedural due process rulings. *Overton v. Bazzetta*, 02-94, Questions Presented.

This Court limited the writ of certiorari to the following questions:

> 1) Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments;
>
> 2) Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penalogical interests; and
>
> 3) Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of

> Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

Overton v. Bazzetta, 537 U.S. 1043 (2002), App. 53a. In its decision, the Court characterized the issues before it as:

> [W]hether the regulations violate the substantive due process mandates of the Fourteenth Amendment or the First or Eighth Amendments as applicable to the States through the Fourteenth Amendment.

Overton v. Bazzetta, 539 U.S. 126, 128 (2003), App. 32a. The judgment of the Sixth Circuit was reversed and the case remanded for further proceedings in conformity with the opinion. *Id.*

Thereafter, respondents moved for peremptory reversal of the district court's injunction and dismissal of the case below. The Sixth Circuit refused to dissolve the district court's injunction, stating that this Court had reversed the Sixth Circuit's decision that "Michigan prisons' regulations were invalid on their face" but reserved argument on the procedural due process issue, App. 25a. On August 28, 2003, the Sixth Circuit remanded the case to the district court for further consideration in light of *Overton*, App. 30a.

On remand, respondents reasserted their right to impose permanent visitation restrictions without hearing, process or criteria for review. The district court affirmed respondents' obligation to present a proposal to cure the procedural due process violations arising from the imposition of permanent bans on visitation, prior to imposing the permanent visitation restrictions. Opinion and Order of December 23, 2003. Respondents then began issuing permanent bans on visitation, without addressing the procedural defects found by the district

court and continued to ignore the compliance order of the Court. Petitioners sought and obtained a restraining order after respondents had placed permanent visitation bans on ninety petitioners without notice, hearing or any opportunity for review.

On January 27, 2004 Defendants filed a motion for an evidentiary hearing arguing that the district court's prior factual findings had been vacated by this Court's opinion in Overton and asked for the injunction to be dissolved. The district court declined to lift its order enjoining respondents from re-imposing permanent visitation bans until procedural protections were in place. The district court reasoned that this Court had neither granted certiorari as to petitioners' procedural due process rights nor overruled the district court's findings on this issue. Order Denying Defendants' Motion for Evidentiary Hearing and Certifying Interlocutory Appeal Pursuant 28 U.S.C. § 1292(b), February 11, 2004, App. 24a.

In their appeal of the February 11, 2004 order, respondents argued that *Overton* stood for the proposition that prisoners have no liberty interest in visitation and do not retain any First Amendment right of association, precluding any procedural due process requirements surrounding the imposition of a permanent visitation ban. While acknowledging that *Overton,* "did not grant certiorari or otherwise expressly address the procedural due process issue," the Sixth Circuit found that the Overton Court had "implicitly ruled on this issue, in a manner inconsistent with the holding of the district court." *Bazzetta v. McGinnis*, 430 F.3d at 802, App. 14a. The Sixth Circuit concluded that this Court's decision in *Overton* foreclosed petitioners' due process claims. App, 20a.

REASONS FOR GRANTING THE WRIT

When this Court granted respondents' petition for certiorari in 2003, it did not choose to review the lower court's holdings that Michigan was required to establish basic procedural due process protections prior to imposing permanent visitation restrictions on petitioners who had two misconduct citations for substance abuse. This Court declined to interfere with the district court's decision to lift all the permanent visitation bans then in effect and to enjoin future such bans until criteria and procedures for implementation and removal were established. This Court's decision in *Overton* assumed the existence of such protections for the individual petitioners who had been subject to the permanent restrictions when it issued two cautions for the future:

> We agree the restriction is severe and if faced with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case, which challenges the validity of the restriction of non-contact visits in all instances.

Overton at 134, App. 39a-40a; and

> If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different consideration. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however,

> would not support the ruling of the Court of Appeals that the entire regulation is invalid.

Overton, at 137, App. 42a.

However, after this Court's ruling, Michigan asserted an unfettered right to impose permanent visitation restrictions without hearings, criteria or any process for opposing the imposition of restriction. Respondents asserted that the district court's factual findings as to the arbitrary and capricious use of the ban were vacated by *Overton* and imposed over ninety individual bans without notice or opportunity for hearings, before the district court issued its February 11, 2004 order enforcing its injunction.

The Sixth Circuit ruling, that petitioners seek to have reviewed, reversed the district court's order because it found it to be "inconsistent with *Overton*" based on its reading of *Overton's* "implicit" holding that petitioners' claims for procedural due process rights related to their visitation restrictions were now foreclosed. The Sixth Circuit's interpretation of *Overton* is directly contrary to this Court's refusal to foreclose procedural due process claims surrounding prisoners' fundamental right of association. *Overton v. Bazzetta*, 539 U.S. 126, 137, App. 42a ("If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations"); *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 465 ("Nothing in the court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the due process clause in a way that the precise and individualized restrictions at issue here do not").

The Sixth Circuit's decision finds that the highest court in the nation has created law "implicitly" on an issue it chose not to review and then misconstrues this Court's ruling in a manner contradictory to all indications of the *Overton* Court's actual intent. By making a sweeping holding that petitioners do not possess any associational rights to visitation and therefore have no claim to procedural protections, the Sixth Circuit has exposed petitioners to the imposition of visitation restrictions for indefinite periods without any procedural due process safeguards and has created a deeply troubling precedent.

The Sixth Circuit's decision reversing the district court's order, erroneously finds that the district court's ruling and the *Overton* decision are inconsistent and ignores the recognition of Plaintiffs' fundamental First Amendment right of intimate association as an independent source of Fourteenth Amendment protections.

The Sixth Circuit also erred by disregarding its own decision in *Austin v. Wilkinson*, 372 F.3d 346 (2004), *aff'd in part and rev'd in part on other grnds*, 545 U.S. 209 (2005). *Austin* established that when conducting the analysis required by *Sandin v. Conner*, 515 U.S. 472 (1995), the prison system at issue is the appropriate baseline for determining when a liberty interest, requiring due process safeguards, arises from an atypical and significant hardship relative to the ordinary incidents of prison life.

ARGUMENT

I. By holding that this Court, in *Overton*, implicitly found that no procedural safeguards are required before a State permanently prohibits prisoners from having visits with their families, even though this Court never addressed that issue, the Sixth Circuit misinterpreted *Overton* and created a result this Court never intended.

While acknowledging that this Court "did not grant certiorari or otherwise expressly address the procedural due process issue", the Sixth Circuit concluded: "Nonetheless, we find that the Court implicitly ruled on this issue, in a manner inconsistent with the holding of the district court." To reach this conclusion, the panel had to take several extraordinary steps.

First, the panel had to find that, after this Court excluded the procedural due process claim from the list of questions on which it chose to grant certiorari and without ever stating explicitly that it was resolving that claim, this Court nonetheless resolved the claim by making a single comparative reference to a due process decision while expressly deciding only an Eighth Amendment question.

Second, the panel had to disregard numerous indications from this Court that it did, in fact, intend to require that procedural safeguards be available to prisoners denied all visits from family members for indefinite periods. A punishment that may amount to a permanent denial of virtually all visitation.

Third, the panel had to misinterpret existing law in two critical ways. It ignored this Court's recognition of the

fundamental right to intimate association as an independent basis for requiring procedural safeguards and it failed to apply its own decision about the correct baseline for determining when a prison regulation creates an "atypical and significant hardship" that cannot be imposed without due process protections

A. The Sixth Circuit erroneously held that this Court implicitly decided an issue of constitutional significance and great practical importance that it explicitly chose not to review.

The absence of any procedural safeguards when permanent visiting bans were imposed on 1,715 people was a major focus at trial. The district court made extensive findings of fact on the issue. *Bazzetta v.* McGinnis, 148 F.Supp.2d 813, 833-45 (2001). A dozen lengthy footnotes in its opinion (notes 36-47) summarized dozens of individual examples of arbitrary and capricious decisions that resulted from the lack of any criteria for when and how restrictions should be imposed or when and how they should be lifted. *Id.* at 837-44. Ultimately the court found that a permanent visiting restriction constitutes an atypical and significant hardship under *Sandin v Conner, supra,* for the purpose of requiring due process protections before the restriction can be imposed. *Id.* at 857-59. It ordered that existing restrictions be lifted and enjoined the imposition of further restrictions until procedural safeguards were implemented. The Sixth Circuit Court of Appeals affirmed.

Despite the constitutional and practical significance of the issue, the defendants did not list the issue of procedural due process among the questions on which it sought certiorari. That is, they did not choose to contest the resolution of the due process claim below. This Court, in granting certiorari,

revised defendants' proposed list of questions for review, and also did not include the procedural due process issue. Therefore, the issue was not briefed by the parties or argued orally. It was not mentioned at the beginning of the *Overton* decision when the question before the Court was described. Nowhere in the body of the opinion are the procedural problems with the permanent restriction discussed.

Nonetheless, the Sixth Circuit found that the *Overton* Court had implicitly overruled the district court's Fourteenth Amendment holdings. The panel "extrapolated" this conclusion from the fact that the *Overton* Court found that withdrawing visiting privileges for a limited period of time is not such a dramatic departure from accepted standards as to constitute cruel and unusual punishment under the Eighth Amendment. The *Overton* Court buttressed its statement by saying: "*Cf. Sandin v. Conner...*", App. 42a.

This passing comparative reference to *Sandin* is far too thin a reed to support the Sixth Circuit's sweeping conclusion. The fact that any particular punishment can be imposed without violating the Eighth Amendment does not mean that it can be imposed without observing basic procedural safeguards. If that were true, no due process protections would ever have to be employed in imposing routine prison sentences on those convicted of crime. Even when the punishment is imposed on one who is already a prisoner, the conceptual distinction between a substantive violation of the Eighth Amendment and the need for procedural due process must be maintained.[1]

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[1] Indeed, if a dramatic departure from accepted standards meant the same thing in the Eighth and Fourteenth Amendment contexts, it could lead to the anomalous result that prisoners are entitled to procedural safeguards only when the punishment being imposed

Finding that this Court has created law "implicitly", on an issue its opinion in no way addresses, requires substantial caution. Even more caution should be employed when this Court had every opportunity to decide the issue and deliberately chose not to. The Supreme Court does not decide issues outside the questions presented by the petition for certiorari. *Glover v. United States,* 531 U.S. 198, 205 (2001). Even stronger caution should be exercised where the lower court is extrapolating, not from a reasoned analysis of the Supreme Court after briefing and argument of the issue, but rather from dicta to decide a constitutional issue not yet addressed by the Circuit or this Court.

It should not be assumed that the Supreme Court intends to reverse findings of constitutional violations in a manner that is indirect, unstated and open to debate. Where both the district and circuit courts have found a constitutional violation, a Supreme Court opinion should only be interpreted as implicitly overturning that finding when no other reasonable conclusion can be drawn. That is far from the situation here.

B. An accurate reading of *Overton,* in its broader context, reveals this Court's intent to preserve the district court's ruling on procedural safeguards for permanent visitation restrictions to ensure that this restriction is not imposed in an arbitrary manner.

The Sixth Circuit ignored many positive indications that this Court not only intended, but relied upon, the continuing effectiveness of the district court's due process ruling.

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violates the constitutional prohibition against cruel and unusual punishment and therefore cannot be implemented at all.

When this case reached the Supreme Court, the order prohibiting the implementation of permanent visiting restrictions without due process safeguards was in place. That was the status quo the *Overton* Court chose not to upset when it: 1) denied defendants' petition to stay the mandate affirming the plaintiffs' procedural due process rights; and 2) chose not to review the district court's decision requiring procedural safeguards. What is implicit throughout *Overton* is the assumption that, in general, the ban is not being applied arbitrarily because an appropriate decision-making process is in place.

At the end of a short analysis of plaintiffs' Eighth Amendment claim, the *Overton* Court said:

> If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however, would not support the ruling of the Court of Appeals that the entire regulation is invalid.

Overton, supra at 134. As an individual could not have a claim that procedural safeguards were denied unless such safeguards exist, the most reasonable reading of *Overton* is that the Court intended to leave the procedural protections required by the district court in place when it permitted the withdrawal of visiting privileges as punishment and that it intended to allow procedural due process violations to be litigated by individuals when those protections were inadequate or improperly applied in a given case. *See also, Cordova v. LeMaster*, 96 P.3d 778, 784-85, 136 N.M. 217 (2004) ("by this language, we believe the Supreme Court

implicitly recognized that the withdrawal of an individual inmate's visitation privileges without affording that inmate certain procedural safeguards would violate the due process clause").

Further, where this Court let stand the district court's ruling, reinstating visitation for those individual prisoners whose restrictions were arbitrarily imposed between 1995 and 2001, it would be incongruous to allow *Overton* to stand for the proposition that future restrictions could be imposed without due process protections.

There are other indicia that this Court's decision in *Overton* was not intended to preclude due process protection claims for, what this Court acknowledged was, a "severe punishment." *Overton* was authored by Justice Kennedy, whose concurrence in *Kentucky Dept. of Corrections v Thompson*, 490 U.S. 454 (1989) is often cited. The narrow holding in *Thompson* was that an individual visitor could be excluded for cause without a hearing. Justice Kennedy wrote separately to note that:

> ...this case involves a denial of prison access to particular visitors, not a general ban on all prison visitation. Nothing in the Court's opinion forecloses the claim that a prison regulation permanently forbidding all visits to some or all prisoners implicates the protection of the Due Process Clause in a way that the precise and individualized restrictions at issue here do not. *Thompson,* 490 U.S. at 465 (Kennedy, concurring)

Given that the potential issue to which Justice Kennedy was so attuned in *Thompson* was exactly the issue the district court resolved in *Overton,* it seems unlikely that Justice

Kennedy would be inclined to overrule the district court in as ambiguous and indirect a manner as the Sixth Circuit suggests.

There is also the concurrence in *Overton* itself, authored by Justice Stevens and joined by Justices Souter, Ginsburg and Breyer. The concurring Justices stressed that the Eighth Amendment is not the sole basis for protection of prisoners constitutional rights:

> Under that rejected view, the Eighth Amendment's prescription of cruel and unusual punishment would have marked the outer limit of the prisoner's constitutional right. It is important to emphasize nothing in the Court's opinion today signals a resurrection of any such approach in cases of this kind.

These do not appear to be the words of Justices who are inclined to overturn *by implication* Fourteenth Amendment rights found by the district court and upheld by the court of appeals. Yet leaving the Eighth Amendment as the only protection available to prisoners facing years without any visits is exactly what the Sixth Circuit has extrapolated from the majority decision in *Overton*.

By taking this Court's actions and language in *Overton* wholly out of context, the Sixth Circuit has set a dangerous precedent. The *Overton* majority was very cautious about not construing a prisoner's fundamental right to intimate association more narrowly than was necessary for its decision. Yet the Sixth Circuit has effectively interpreted *Overton* to mean that this fundamental right can be taken away in as arbitrary and capricious a manner as any state corrections

official chooses to employ, leaving prisoners without recourse to the Fourteenth Amendment's protections.

II. The Sixth Circuit reached its erroneous conclusions that petitioners were not entitled to due process protections by misinterpreting this Court's analysis in *Overton* and its own decision in *Austin v Wilkinson*.

The Sixth Circuit erred in ruling that the district court's holding -- that prisoners are entitled to procedural safeguards in connection with the imposition and lifting of permanent visiting bans because they have a liberty interest at stake – was reversed by *Overton*. The district court's rulings were based upon an understanding that this liberty interest arises from two independent sources.

First, since permanent bans apply to immediate family members, the fundamental First Amendment right to intimate association gives rise to a liberty interest that cannot be restricted without appropriate procedural safeguards. *Bd. of Regents v. Roth,* 408 U.S. 564, 572 (1972).

Second, although a limited use of visiting restrictions may not be an uncommon form of prison discipline in some states, the permanent visiting ban permitted by the Michigan rule is such an "atypical and significant hardship. . . in relation to the ordinary incidents of prison life" that it results in a state-created liberty interest as contemplated by Sandin v. Connor, 575 U.S. 472, 484 (1995). The extreme nature of the permanent ban for substance abuse is particularly apparent when compared to the visitation permitted to Michigan prisoners under all other circumstances, regardless of their misconduct history or security classification. Austin v. Wilkinson, 372 F.3d 346, 355 (2004) (baseline standard of comparison is prison system under review).

As neither the district court's extensive findings of fact, nor the law upon which it relied, were reversed by this Court, the district court correctly declined to dissolve its injunction and held, instead, that Defendants may not impose permanent visiting bans until the procedural due process violations previously found have been cured. The Sixth Circuit's reversal of this opinion was based on its failure to fully apply this Court's analysis in *Overton* and its own precedent in *Austin* and an improper analysis of petitioners' First Amendment rights of association.

A. The panel ignored the fundamental right of intimate association as an independent basis for requiring procedural safeguards.

The district court's February 11, 2004 order stated:

> Moreover, contrary to Defendants' position here, the *Overton* court expressly stated the limits of its decision. "We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners." *Overton*, ___ U.S. at ___, 123 S.Ct. at 2167. It is well established that constitutionally protected rights, like those at issue here, constitute liberty interests that warrant procedural due process protections. *See Bd. of Regents v. Roth*, 408 U.S. 564, 572-73 (1972). *See also Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Friedman v. Maryland*, 380 U.S. 51 (1965).

Order Denying Defendants' Motion for Evidentiary Hearing and Certifying Interlocutory Appeal Pursuant 28 U.S.C. § 1292(b), February 11, 2004, App. 25a.

The Sixth Circuit reversed, holding that *Overton* implicitly foreclosed any guarantee of due process protections for prisoners arising out of claims of loss of visitation. *Bazzetta v. McGinnis,* 430 F.3d at 802, 805. App. 5a. While *Overton* has been interpreted by other courts as reaffirming prisoners' fundamental right to intimate association, *Maydak v. U.S.*, 363 F.3d 512, 516 (D.C. Cir. 2004) (recognizing that *Overton* confirms the proposition that prisoners retain a right of intimate association that may be curtailed under appropriate circumstances); *Johnson v. California*, 336 F.3d 1117, 1122 (9th Cir. 2003) ("*Cf. Overton* applying *Turner* to freedom of association claims relating to family visitation."); *Kelly v. Lewis*, 88 Fed. Appx. 282 (9th Cir. 2004) ("recognizing that right to association survives incarceration" citing *Overton*); *Yoder v. Wisconsin Dept. Of Corrections*, 2004 WL 602647 (W.D. Wis. 2004) ("The Supreme Court has assumed that prisoners retain some right of familiar association," citing *Overton*), the Sixth Circuit refused without analysis to acknowledge a right of intimate association as a basis for petitioners' due process protections.

Instead, the Sixth Circuit decision conflated its First Amendment analysis with the second prong of the *Sandin* test, *i.e.*, whether corrections officials have imposed restraints that "exceed [the prisoner's] sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force." The Sixth Circuit opinion states: "This court has not addressed the issue of whether an incarcerated felon has a constitutionally protected liberty interest in prison visitation pursuant to the Due Process Clause" (fn. omitted). It then concludes:

> We know of no circuit court that has found an implicit due process right to prison visitation. In fact, the *Sandin* decision perpetuated the Court's general

> resistance to directly reading the Due Process Clause without support from a positive source of law, absent evidence of a "grievous loss."

Bazzetta v. McGinnis, 430 F.3d at 804-05, App. 20a.

This conclusion ignores two critical points. First, the constitutional right at issue is not a due process right to prison visitation but the right to intimate association. Second, the *Overton* Court itself refused to find that prisoners have no right to intimate association that would require due process protections. On the contrary, the majority opinion states:

> We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners.

Overton v. Bazzetta, 539 U.S. at 131. *See also Maydak v. U.S., supra.* The *Overton* Court then proceeded to apply to the permanent restriction rule the four-factor analysis required by *Turner v. Safley,* 482 U.S. 78 (1987) to determine "whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge." *Overton v Bazzetta, 539 U.S. at* 132, App. 37a.

B. The panel's decision conflicts with Sixth Circuit law and misinterprets this Court's rulings on the appropriate standard for a state-created liberty interest.

Petitioners assert that not only do they have a liberty interest in associating with immediate family members under the First Amendment, but that even under the test of *Sandin,* they have a liberty interest in not having all their visits

permanently restricted without due process. *Sandin* held that a state-created regulation gives rise to a liberty interest requiring procedural safeguards when it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 483-84. Recognizing that the Courts of Appeals have diverged, this Court recently declined to resolve how courts should identify the appropriate baseline for determining whether a hardship is "ordinary" or "atypical and significant." *Wilkinson v. Austin*, 545 U.S. 209; 125 S.Ct. 2384, 2394 (2005). In so doing, the standard established by the Sixth Circuit in *Austin* was left intact: The relevant inquiry is whether the punishment is atypical when compared to the ordinary conditions of confinement for that prison system:

> [W]e reject emphatically the [defendant's] argument that the baseline should be out-of-state supermax prisons. Whatever the "ordinary incidents of prison life" may encompass, they must be decided with reference to the particular prison system at issue . . .

Austin v. Wilkinson, 372 F.3d 346, 355 (6th Cir. 2004).

It is undisputed that permitting visitation is the norm in Michigan. Visiting is permitted at every security level. Even people housed in punitive segregation for assaulting staff or other prisoners are entitled to visitors. When conditions in Michigan's prisons are used as the baseline, the district court's findings that a permanent prohibition on all visits is an atypical and significant hardship were not clearly erroneous. Nor was the district court's requirement that respondents must provide basic due process prior to imposing such permanent bans so contrary to governing law as to constitute an abuse of discretion.

The Sixth Circuit compounded its neglect of the critical baseline determination by relying excessively on this Court's reference to *Sandin* in *Overton*. In the context of deciding whether the regulation allowing for permanent visitation restrictions was, on its face, "unusual" for Eighth Amendment purposes, this Court compared Michigan's rules to those of other states and found that "withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline" was "not a dramatic departure from accepted standards for conditions of confinement. *Cf. Sandin v. Conner.*" *Overton v. Bazzetta,* 539 U.S. 126, App. 42a.

That this Court found the use of visitation restrictions, as discipline in general, to be not so unique as to violate the Eighth Amendment's prohibition on cruel and unusual punishment, says nothing about the specific procedural due process violations found by the district court to be present in Michigan's permanent visitation ban policies and procedures. Nor does it undermine the district court's finding that the issuance of the permanent ban constitutes an "atypical and significant hardship" on petitioners when compared to ordinary prison life in Michigan. Nothing in *Overton* or *Sandin* forecloses the district court's ruling that the permanent visit ban constituted an atypical deprivation as compared with the ordinary conditions of confinement for a prisoner in Michigan.

The Sixth Circuit erred in relying on the fact that this Court found no Eighth Amendment violation, to reverse the district court finding of Plaintiffs' entitlement to procedural safeguards when permanent restrictions are imposed. This Court characterized even a two-year loss of visitation as a "severe punishment" and said such a restriction "undoubtedly makes the prisoner's confinement more difficult to bear."

Overton further cautioned that if the visitation ban were "permanent or for a much longer period" that would present different concerns even under the Eighth Amendment. Nothing in this language undermines the district court's findings that the restriction placed on Plaintiffs – which did just that – implicated a liberty interest requiring procedural safeguards.

CONCLUSION

Petitioners urge this Court to summarily reverse the Amended Opinion of the Sixth Circuit as a misinterpretation of this Court's decision in *Overton v. Bazzetta* and to affirm the district court's holdings regarding the petitioners' rights to procedural due process before permanent visiting restrictions are imposed or, in the alternative, grant certiorari for purposes of addressing petitioners' rights to procedural due process when their fundamental rights to intimate association are indefinitely restricted by prison officials and to address the baseline standard for analyzing whether petitioners possess a sufficient liberty interest requiring procedural protections when permanent visiting restrictions are imposed as punishment for two substance abuse misconducts, a punishment which constitutes an atypical and significant hardship in relation ship to the ordinary incidents of prison life in Michigan.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1823

[Filed March 9, 2006]

MICHELLE BAZZETTA, ET AL.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
KENNETH MCGINNIS, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL.,	)
	)
Defendants-Appellants.	)
	)

BEFORE: CLAY and SUTTON, Circuit Judges; and OBERDORFER, District Judge.*

ORDER

* Hon. Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1823

[Filed November 28, 2005]

MICHELLE BAZZETTA, et al.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
KENNETH MCGINNIS, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,	)
	)
Defendants-Appellants.	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 95-73540 — Nancy G. Edmunds, District Judge.

Before: CLAY and SUTTON, Circuit Judges; OBERDORFER District Judge.*

AMENDED OPINION

OBERDORFER, District Judge. This case marks another chapter in a ten-year controversy between incarcerated felons, their visitors, and the Michigan Department of Corrections ("MDOC"). In 1995, MDOC issued regulations affecting prisoners' visitation privileges, including a permanent ban on virtually all visitation for prisoners found guilty of two or more substance abuse violations. After a bench trial, the district court ruled that MDOC's visitation limitations, including the substance abuse regulation, violated the prisoners' constitutional rights under the First and Eighth Amendments and their Fourteenth Amendment substantive and procedural due process rights. A panel of this court affirmed the district court's judgment and the district court issued an order of compliance enjoining the MDOC from implementing the regulations. The Supreme Court granted the MDOC's petition for certiorari on the prisoners' First, Eighth and Fourteenth Amendment substantive due process claims and reversed this court's affirmance in *Overton v. Bazzetta*, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). The Court did not grant certiorari with respect to the plaintiffs' Fourteenth Amendment procedural due process claim, nor otherwise address it directly. On remand, the district court declined to dissolve its injunctive order of compliance, ruling that its procedural due process holding was not disturbed by the Supreme Court's decision.

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* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

MDOC appeals the district court's refusal to dissolve the injunction, arguing that although the Supreme Court did not grant certiorari on this court's procedural due process holding, it implicitly foreclosed any facial procedural due process challenges to the substance abuse regulation. Thus, at issue is whether the district court abused its discretion in failing to dissolve its injunctive order in light of *Overton*. For the reasons stated below, we hold that the district court abused its discretion because its procedural due process ruling is inconsistent with *Overton*. Accordingly, we REVERSE the district court's opinion and order denying MDOC's motion for summary judgment and granting the plaintiffs' motion to enforce compliance. Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship," thus implicating a protected liberty interest.

I. BACKGROUND

In 1995, MDOC issued regulations limiting the visitation rights of prisoners, in part to control the widespread use of drugs and alcohol. *Overton*, 539 U.S. at 129-130. Among other limitations, the regulations authorize the Director of the MDOC to restrict permanently all visits for a prisoner who is found guilty administratively of "[t]wo or more violations of the major misconduct charge of substance abuse," *e.g.* possession of narcotics, alcohol, unauthorized prescription drugs, or drug paraphernalia, or for failure to submit to a drug test. *Bazzetta v. McGinnis*, 286 F.3d 311, 321 & n.2 (6th Cir. 2002) (internal quotations omitted). According to the substance abuse regulation, prisoners whose visits have been permanently restricted nevertheless receive visits from "attorneys or [their] representative[s], [or] qualified clergy and staff from the Office of the Legislative Corrections Ombudsman . . . ." *Bazzetta v. McGinnis*, 148 F. Supp. 2d

813, 833 (E.D. Mich. 2001). Inmates may also request that the visitation ban be lifted after six months or two years, depending on the underlying infractions. *Id.* Reinstatement of visitation privileges is within the warden's discretion. *Id.*

In August 1995, the plaintiffs, a class of prisoners incarcerated by MDOC, and their prospective visitors, challenged the substance abuse regulation on its face.[1] *Id.* at 815. They asserted that the permanent ban on visitors for two violations of the drug abuse policy: (1) infringed the prisoners' First Amendment right of intimate association and was not reasonably related to a valid penological objective; (2) constituted cruel and unusual punishment prohibited by the Eighth Amendment; and (3) violated the prisoners' Fourteenth Amendment procedural due process rights. *Id.* at 845-58. The case proceeded to a bench trial and, on April 19, 2001, the district court held that the regulations violated the prisoners' rights under the First, Eighth and Fourteenth Amendments. *Id.*

In addressing the plaintiffs' procedural due process claim, the court first asked whether Michigan prisoners have a liberty interest in visitation that had been infringed by the substance abuse regulation. *Id.* at 857. The court noted that a liberty interest arises from two distinct sources -- from the implicit guarantees of the Due Process Clause itself, or as a result of state action. *Id.* The court addressed only whether

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[1] The Plaintiffs also challenged regulations that: (1) excluded, from family members with whom inmates were entitled to non-contact visits, any minor nieces and nephews and children as to whom parental rights had been terminated; (2) required all children visiting an inmate to be accompanied by a family member or legal guardian; and (3) prohibited former inmates from visiting inmates. These regulations are not the subject of the instant appeal.

the prisoners derive a liberty interest from the state-issued substance abuse regulation. *Id.* Accordingly, it analyzed the regulations under the formulation established by the Supreme Court in *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) -- that a liberty interest arises where the state's regulations impose "freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless impose[] [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

In determining that the substance abuse regulation imposes an "atypical and significant hardship," the court considered (1) the effect of the restraint on the length of prison confinement; (2) the extent to which the prisoners' confinement is altered from routine prison conditions; and (3) the duration of the restraint. *Bazzetta*, 148 F. Supp. 2d at 857 (citing *Jones v. Baker*, 155 F.3d 810, 814 (6th Cir. 1998) (Gilman, J., concurring)). It acknowledged that the regulations do not affect the length of confinement but found that they create "an unusually harsh and punitive environment for the prisoners restricted." *Id.* at 858. Further, it found significant that the restriction on visitation is permanent -- "[a]lthough the regulations provide for the possibility of review after two years, there are many instances where no such review occurs, or where reinstatement of privileges after two years is denied." *Id.*

Recognizing a liberty interest in visitation that had been infringed by the permanent visitation ban, the court then asked "'whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Id.* at 857 (citing *Hewitt v. Helms*, 459 U.S. 460, 472, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983)). It found many procedural problems

with the implementation of the permanent visitation ban -- notably that: (1) there are no written criteria to guide the Director of the MDOC's decision whether to impose the ban, resulting in inconsistent enforcement, *id.* at 836-37; (2) prisoners are not entitled to a hearing on the imposition of the permanent ban or an opportunity to challenge the ban based on unusual or extenuating circumstances, *id.* at 838, n.39; and (3) there are no ascertainable criteria for the restoration of visiting privileges, without any apparent uniform standard being applied, *id.* at 839. The court thus determined that "[t]he inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard are all procedural deprivations of constitutional dimension." *Id.* at 858.

On April 16, 2002, a panel of this court affirmed the district court judgment for the plaintiffs. *Bazzetta v. McGinnis*, 286 F.3d 311, 324 (6th Cir. 2002). The district court subsequently issued an order of compliance on May 16, 2002, directing MDOC to comply with the terms of the court's judgment and enjoining the Department from enforcing the regulations "or any rule, policy, or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for controlled substance violations." JA 75. In response to the district court's order, MDOC lifted the regulations on visitation privileges on all inmates subject to the permanent ban. JA 189.

MDOC filed and the Supreme Court granted a petition for certiorari. The Court limited its review, however, to "whether the regulations violate the substantive due process mandate of the Fourteenth Amendment, or the First or Eighth Amendments . . . ." *Overton*, 539 U.S. at 128. On the merits, the Court reversed, ruling that the regulations did not facially infringe the prisoners' First Amendment rights of

intimate association or violate their Fourteenth Amendment substantive due process rights. *Id.* at 131-36. In so holding, the Court stated that it was not implying that "any right to intimate association is altogether terminated by incarceration" but it noted that "[w]e must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id.* at 131-32; *see also id.* at 134 ("Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose."). The Court also held that the withdrawal of visitation privileges did not "fall below the standards mandated by the Eighth Amendment." *Id.* at 137.

The *Overton* Court did not grant certiorari on the issue of whether the regulations violated the prisoners' procedural due process rights under the Fourteenth Amendment. In the context of its Eighth Amendment discussion, however, the Court noted that the "withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline . . . . is not a dramatic departure from accepted standards for conditions of confinement. *Cf. Sandin v. Conner*, 515 U.S. 472, 485, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)." *Id.* The Court admonished that "[i]f the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." *Id.* at 137. It concluded, however, that "[a]n individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards . . . would not support [a] ruling . . . that the entire regulation is invalid." *Id.*

On August 27, 2003, MDOC moved for peremptory reversal of the district court's order of compliance and dismissal of the case. A panel of this court denied the motion so that the district court could consider the validity of the order in the first instance. *Bazzetta v. McGinnis*, 79 Fed. Appx. 161, 2003 WL 22434575, at *1 (6th Cir. 2003). A separate panel of this court remanded the case to the district court "for further consideration in light of the Supreme Court opinion." *Bazzetta v. McGinnis*, 73 Fed. Appx. 842, 2003 WL 22071463, at *1 (6th Cir. 2003). This panel specifically noted that the Supreme Court preserved "any argument that an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards would pass muster under the First and Eighth Amendments . . . ." *Id.* (internal quotations omitted).

Meanwhile, MDOC reinstated the regulation permitting permanent visitation restrictions for two major misconduct substance abuse violations, with a few minor revisions. JA 161-62. MDOC voluntarily chose not to reinstate the restrictions on individual prisoners that were removed due to the May 16, 2002 order of compliance. *Id.*

On October 17, 2003, MDOC moved for summary judgment in the district court on the plaintiffs' procedural due process claims. JA 53-77. The plaintiffs countered with a motion to enforce compliance. JA 78-91. On December 23, 2003, the district court denied MDOC's motion for summary judgment, granted the plaintiffs' motion to enforce compliance and confirmed MDOC's obligation to present a proposal to cure the procedural due process violations arising from the imposition of the substance abuse regulation. JA 185-198. The district court acknowledged that MDOC had revised the regulation but found that it failed to correct the significant procedural problems associated with the

implementation of the permanent ban on visitation. *Id.* Further, the district court rejected MDOC's mootness claim, holding that "'[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"[2] *Id.* at 189 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (internal quotations omitted)).

Despite the district court's December 23, 2003 order, MDOC continued to issue permanent bans on visitation to inmates committing two major misconduct substance abuse violations. On February 11, 2004, upon further motions, the district court issued a supplemental order confirming its December 23, 2003 ruling and denying MDOC's motion for an evidentiary hearing. JA 299-301. The court, however, certified the question of whether its order was fully consistent with the Supreme Court's decision in *Overton* for interlocutory appeal, in accordance with 28 U.S.C. § 1292(b). *Id.* at 301.

On February 23, 2004, MDOC petitioned for permission to appeal, representing that the district court had certified the question for review as "whether prisoners have a liberty interest in visitation." A panel of this court denied the petition as unnecessary, holding that MDOC, in reality, was seeking to appeal the district court's "order refusing to dissolve the injunctive relief previously ordered by the court [namely, the

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[2] The court also held that the case was ripe for review because there is no factual development needed to discover how the regulation will be implemented, no indication that the MDOC will change its position regarding the enforcement of the regulation, and the hardship to the prisoners to wait until their visitation rights are revoked is great. JA 190-91.

May 16, 2002 order of compliance] pursuant to its finding that the plaintiffs' procedural due process rights were violated." JA 328-29. Thus, the panel treated the petition as a notice of appeal pursuant to 28 U.S.C. § 1292(a)(1). *Id.* We now entertain that appeal.

II. ANALYSIS

A. Standard of Review for Procedural Due Process Claims

The Fourteenth Amendment protects an individual from deprivation of life, liberty or property, without due process of law. "[T]hose who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin*, 125 S. Ct. 2384, 2393, 162 L. Ed. 2d 174 (2005). Accordingly, a procedural due process analysis addresses two questions. "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989) (citations omitted).

In evaluating a claimed liberty interest by prison inmates, courts are mindful that imprisonment necessarily "carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). The "curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, chief among which is internal security." *Id.* at 524 (internal citations omitted). Accordingly, not every "action taken for

a punitive reason encroaches upon a liberty interest under the Due Process Clause . . . ." *Sandin*, 515 U.S. at 484.

Prisoners, however, retain a "residuum of constitutionally protected liberty," *Thompson*, 490 U.S. at 466 (Marshall, J., dissenting); *see Meachum v. Fano*, 427 U.S. 215, 224, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) ("Our cases hold that a convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison."), that emanates from two discrete sources: (1) state law can establish a protectible liberty interest, or (2) the Constitution can create a liberty interest when a condition or restraint is so egregious as to implicate the Due Process Clause itself. *See Austin*, 125 S. Ct. at 2393.

Here, MDOC argues that the Supreme Court's decision in *Overton* implicitly held that the substance abuse regulation neither creates a protectible liberty interest nor implicates the guarantees of the Due Process Clause itself. MDOC claims that because the *Overton* Court foreclosed finding a liberty interest on the face of the regulation, when it determined that it did not constitute a "dramatic departure from acceptable standards for conditions of confinement," *Overton*, 539 U.S. at 137, the district court lacks authority to continue to enjoin its implementation of the substance abuse regulation, absent additional procedural safeguards. Accordingly, MDOC argues, the district court erred in refusing to dissolve its May 16, 2002 order of compliance.

The plaintiffs counter that the Supreme Court did not grant certiorari on the procedural due process issue and, thus, could not have overruled the holding of the district court that the substance abuse regulation established a liberty interest in visitation. In fact, the plaintiffs argue, the *Overton* Court expressly preserved their right to assert an "as applied"

challenge to the regulation, such as the one sustained by the district court in this case. Moreover, they contend that even if the Supreme Court's decision foreclosed finding a state-created liberty interest arising from the substance abuse regulation, the prisoners' liberty interest in visitation is implicit in the Due Process Clause.

We review a district court's denial of a request to dissolve an injunction for abuse of discretion. *See Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 678 (6th Cir. 1994), *aff'd*, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995). However, a district court's improper application of governing law constitutes an abuse of discretion. *See United States v. Colahan*, 635 F.2d 564, 566 (6th Cir. 1980); *see also Mascio v. Public Emples. Retirement Sys.*, 160 F.3d 310, 311 (6th Cir. 1998) (noting that a district court's decisions on injunctive relief are seldom disturbed unless it relied on clearly erroneous findings of fact, improperly applied governing law, or used an erroneous legal standard).

B. *Overton*'s Implicit Holding

Plaintiffs first argue that the district court did not improperly apply governing law, *i.e. Overton*, by refusing to dissolve its May 16, 2002 injunctive order because the *Overton* Court did not grant certiorari on the procedural due process issue. Further, they claim that nothing in the Court's decision indirectly undermined the district court's finding that the substance abuse regulation violated the prisoners' procedural due process rights. We agree that the Court did not grant certiorari or otherwise expressly address the procedural due process issue. Nonetheless, we find that the Court implicitly ruled on this issue, in a manner inconsistent with the holding of the district court.

In the context of analyzing the "unusual" component of the Eighth Amendment's prohibition against cruel and unusual punishment, the *Overton* Court held that the substance abuse regulation was a "regular means of effecting prison discipline" which did not constitute "a dramatic departure from accepted standards for conditions of confinement." This statement is antithetical to the district court's finding a liberty interest in prison visitation because the regulation imposes on prisoners an "atypical" hardship in comparison to the ordinary incidents of prison life. *See supra* page 5.

Furthermore, the *Overton* Court cited *Sandin* in support of its statement that the regulation was not a "dramatic departure." In *Sandin*, the only issue was the prisoners' right to procedural due process protection before placement in segregated confinement for 30 days, imposed as discipline for disruptive behavior. The *Sandin* Court observed that it had previously employed a methodology for identifying state-created liberty interests that emphasized "the language of a particular [prison] regulation" instead of "the nature of the deprivation." 515 U.S. at 481. The Court abandoned this methodology, significantly limiting the authority of courts to find liberty interests stemming from positive state law in the prison context. Instead, it stated that the relevant inquiry must focus on the nature of the deprivation imposed on a prisoner, holding that if the nature of the deprivation does not impose an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life," prisoners will not have a liberty interest in avoiding the deprivation. "Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not present a dramatic departure from the basic contours of the conditions of [the inmate's] sentence." *Austin*, 125 S. Ct. at 2394 (internal quotations omitted).

We extrapolate from *Overton* and *Sandin* that the substance abuse regulation is neither a "dramatic departure," nor an "atypical and significant hardship" in relation to the ordinary incidents of prison life. Thus, although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation.

C. "As Applied" Procedural Due Process Challenge

The plaintiffs claim, however, that the district court did not rule that the regulation on its face violated the prisoners' procedural due process rights. Instead, they assert, the district court found that the regulation, "as applied" to Michigan prisoners, triggered a state-created liberty interest. Citing the *Overton* Court's language that an individual prisoner could bring a "claim based on indefinite withdrawal of visitation or denial of procedural safeguards," and that "if faced with evidence that MDOC's regulation is treated as a de facto permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation," the plaintiffs maintain that *Overton* expressly preserved their right to bring "as applied" claims.

In arguing that their challenge, as sustained by the district court, does not attack the substance of the regulation, but merely its implementation, the plaintiffs misconstrue both the nature of the district court's ruling and the difference between a facial and as applied procedural due process challenge. The district court held that the substance abuse regulation, on its face, created a liberty interest because it imposed an "atypical and significant hardship" on all prisoners subject to the restriction. *See Bazzetta*, 148 F. Supp. 2d at 858. While the court cited examples of the treatment of particular inmates in

its findings of fact to illustrate what it perceived as the general procedural deficiencies in the implementation of the regulation, *id.* at 836-43, it did not make factual findings as to the application of the regulation to any particular prisoner sufficient to support an as applied procedural due process claim.

As detailed above, the *Overton* Court subsequently foreclosed a facial procedural due process challenge under the standard set forth in *Sandin*. The Court's decision in *Overton* does not preclude individual prisoners from challenging a *particular* application of the substance abuse regulation on First Amendment, Eighth Amendment or Fourteenth Amendment grounds but such "[a]n individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, . . . [does] not support the ruling . . . that the entire regulation is invalid." *Overton*, 539 U.S. at 137; *see also Jones v. Baker*, 155 F.3d at 816 (Gilman, J., concurring) (noting that *Sandin*'s principal directive is that "courts should look to see if the *particular* inmate has been deprived of a state-created interest of 'real substance'") (citing *Sandin*, 515 U.S. at 478); *McClary v. Kelly*, 4 F. Supp. 2d 195, 199 (W.D.N.Y. 1998) ("At its core, *Sandin* instructs courts to look at the nature and extent of the particular deprivation in deciding whether a protected liberty interest is implicated.").

D. Implicit Guarantees of Due Process Clause

Finally, the plaintiffs argue that regardless of whether the substance abuse regulation creates a liberty interest, such an interest emanates from the Due Process Clause itself because the permanent ban on visitation impinges on the prisoners' constitutional right to intimate association.

In addition to state-created liberty interests, the Constitution itself can create protectible liberty interests, but only if corrections officials impose restraints upon the prisoner which "exceed [the prisoner's] sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force." *Sandin*, 115 S. Ct. at 2300. In *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980), for example, the Supreme Court held that a prisoner has a liberty interest in not being involuntarily committed to a mental hospital that is implicit in the Due Process Clause, thus triggering constitutional procedural protections. *Id.* at 489-90; *see also Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) (concluding that a protectible liberty interest was implicated where a prisoner was involuntarily administered psychotropic drugs).

The "Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner," though. *Sandin*, 515 U.S at 478. In fact, a prison inmate does not have a liberty interest in transfer from one prison to another "for whatever reason or for no reason at all," within the State or to another State, regardless of differing conditions in the prisons. *Meachum v. Fano*, 427 U.S. 215, 228, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976). Even a transfer to a maximum security facility with more burdensome conditions is "within the normal limits or range of custody which the conviction has authorized the State to impose." *Id.* at 225. This is true even though such a transfer operates as a "real hardship" on the inmate who is "effectively separated by the transfer from his only contact with the world outside the prison." *Montanye v. Haymes*, 427 U.S. 236, 242, n.4, 96 S. Ct. 2543, 49 L. Ed. 2d 466 (1976) (internal quotations omitted). Analysis of "the nature of the interest involved . . . compels the conclusion" that such a

transfer, even with its changed conditions of confinement, "does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself." *Olim v. Wakinekona*, 461 U.S. 238, 248, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

This court has not addressed the issue of whether an incarcerated felon has a constitutionally protected liberty interest in prison visitation pursuant to the Due Process Clause.[3] There is no question that inmates retain many of the protections of the First Amendment, such as rights to free expression, *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989); to petition the government for the redress of grievances, *Johnson v. Avery*, 393 U.S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969), and to free exercise of religion, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987). But even "[i]n the First Amendment context . . . some rights are inconsistent with the status of a prisoner," *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001), and a prisoner retains only those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974).

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[3] In *Thompson*, the Supreme Court held that whatever rights may be retained by prisoners they do not have an implicit due process right to "unfettered visitation." 490 U.S. at 460; *see also Spear v. Sowders*, 71 F.3d 626, 629-30 (6th Cir. 1995) ("It is clear that a prisoner does not have a due process right to unfettered visitation . . . . A fortiori, a citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension.") (citations omitted).

We know of no circuit court that has found an implicit due process right to prison visitation. In fact, the *Sandin* decision perpetuated the Court's general resistance to directly reading the Due Process Clause without support from a positive source of law, absent evidence of a "grievous loss." Although the substance abuse regulation at issue here is "severe," *see Overton*, 539 U.S. at 134, 156 L. Ed. 2d 162, we decline to hold that, on its face, it rises to the level of egregious conduct necessary to implicate the implicit guarantees of the Due Process Clause.

III. CONCLUSION

For the foregoing reasons and in light of the Supreme Court's decision in *Overton* foreclosing plaintiffs' procedural due process claim, we hold that the district court, in so far as it relied on the Fourteenth Amendment's procedural due process clause, abused its discretion in refusing to dissolve its May 16, 2002 order of compliance. We therefore REVERSE the district court's February 11, 2004 order and REMAND for further proceedings consistent with this opinion. Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship," thus implicating a protected liberty interest.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-0101

[Filed June 10, 2004]

MICHELLE BAZZETTA, et al.,	)
	)
Plaintiffs - Respondents,	)
	)
v.	)
	)
PATRICIA L. CARUSO, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,	)
	)
Defendants - Petitioners.	)

ORDER

Before: MARTIN and SUTTON, Circuit Judges; QUIST, District Judge.*

* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

The defendants in this prisoners' civil rights case petition for leave to appeal a district court order denying their motion for an evidentiary hearing prior to enforcement of the district court's ruling in favor of the plaintiffs on their procedural due process claims. The district court has certified the order for interlocutory review under 28 U.S.C. § 1292(b).

On December 23, 2003, the district court entered a memorandum opinion and order denying the defendants' motion for summary judgment and granting the plaintiffs' motion to enforce compliance with the findings and judgment of the court. In granting the plaintiffs' motion, the district court ruled that the Supreme Court's holding in *Overton v. Bazzetta*, 539 U.S. 126 (2003), did not negate its finding that the defendants' regulation imposing a permanent ban on visitation for prisoners with two or more major misconduct charges of substance abuse violated the plaintiffs' procedural due process rights. *See Bazzetta v. McGinnis*, 148 F.Supp.2d 813 (E.D. Mich. 2001). Pursuant to that finding, and prior to the Court's holding in *Overton*, the district court had enjoined the defendants from enforcing the permanent ban on visitation and required them to post notice that visitation would recommence.

On January 27, 2004, the defendants moved for "an evidentiary hearing prior to the Court entering any order or plan regarding implementation of prior orders concerning alleged procedural due [process] issues." The district court denied the defendants' motion by order entered on February 17, 2004; and sua sponte certified the order for immediate appeal under 28 U.S.C. § 1292(b). Review under § 1292(b) should be sparingly granted and then only in exceptional cases. *Kraus v. Board of County Road Comm'rs for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966). An appeal may, however, be taken as of right from "[i]nterlocutory orders of

the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292 (a)(1). The February 17, 2004, order was tantamount to an order refusing to dissolve the injunctive relief previously ordered by the court pursuant to its finding that the plaintiffs' procedural due process rights were violated. Therefore, we have jurisdiction to review it pursuant to § 1292(a)(1). *See Hadix v. Johnson*, 228 F.3d 662, 668 (6th Cir. 2000).

The defendants' petition for permission to appeal was filed on February 23, 2004, within the time to take a direct appeal and contained all necessary elements for a notice of appeal as prescribed under Fed. R. App. P. 3. For that reason, the petition will be denied as unnecessary and treated as a notice of appeal. *See Standard Asbestos Mfg. and Insulating Co. v. United States*, 676 F.2d 119 (5th Cir. 1982). *Cf. McMillan v. Barksdale*, 823 F.2d 981 (6th Cir. 1987).

The defendants' petition for permission to appeal is DENIED as unnecessary. The district court clerk is directed to docket the petition as a valid notice of appeal. See Fed. R. App. P. 4(g).

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

Case No. 95-73540

[Filed February 11, 2004]

MICHELLE BAZZETTA, ET AL.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
KENNETH McGINNIS, ET AL.,	)
	)
Defendants.	)
	)

ORDER DENYING DEFENDANTS' MOTION FOR EVIDENTIARY HEARING AND CERTIFYING INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)

This matter comes before the Court on Defendants' January 27, 2004 motion for an evidentiary hearing. Although captioned as a motion for an evidentiary hearing, Defendants are in essence seeking summary judgment on the issue whether any viable constitutional claims exist after the Supreme Court's decision in *Overton v. Bazzetta*, __U.S. __, 123 S. Ct. 658 (2002). Specifically, Defendants argue that

Plaintiffs have no viable procedural due process claims because the *Overton* Court determined that, on their face, the challenged Michigan Department of Corrections (MDOC) regulations governing non-contact prisoner visitations did not violate Plaintiffs' First Amendment, Eighth Amendment, or Fourteen Amendment rights. For the reasons stated below, Defendants' motion is DENIED.

This Court has already considered and judgment raising this same issue. In its December 23, 2003 Order, this Court observed that the *Overton* Court did not grant certiorari or address Plaintiffs' procedural due process arguments, even though both this Court and the Sixth Circuit held that imposition of the ban on visitation in response to two substance abuse violations violated prisoners' procedural due process rights. *See* Dec. 23, 2003 Order at 4. Moreover, contrary to Defendants' position here, the *Overton* Court expressly stated the limits of its decision. "We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners." *Overton*, ___U.S. at ___, 123 S. Ct. at 2167. It is well established that constitutionally protected rights, like those at issue here, constitute liberty interests that warrant procedural due process protections. *See Bd. of Regents v. Roth*, 408 U.S. 564, 572-73 (1972). *See also Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Freedman v. Maryland*, 380 U.S. 51 (1965).

As to the facial challenge of the two-year bar on visitation for inmates with two substance-abuse violations, the *Overton* Court, applying *Turner v. Safley*, 482 U.S. 78 (1987), held that "a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons." *Id.* at __, 123 S. Ct. at 2169 (emphasis

added). Accordingly, Plaintiffs' facial challenge of that prison regulation was rejected. Contrary to Defendants' argument here, if a constitutional right were not at issue, *Turner* review would have been superfluous. Moreover, when addressing Plaintiffs' arguments that visitation is not automatically restored at the end of the two-year ban, the Court expressly left open the issue whether an "as applied" procedural due process challenge on the two-year ban would succeed: "if faced with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation." *Id.* In light of the above, this Court concludes that Plaintiffs' procedural due process arguments are not barred by *Overton*.

Furthermore, because the Court is of the opinion that this Order satisfies the criteria set forth in 28 U.S.C. § 1292(b), it is certified for interlocutory appeal. Although in this Court's mind there does not exist a strong probability of reversal on the above issue, the Court certifies it nonetheless so as to provide the Sixth Circuit with an opportunity to consider whether this Court's decision is fully consistent with *Overton*. The issue presents a controlling question of law because, as Defendants argue, if Plaintiffs have no viable constitutional claims after *Overton*, then they cannot go forward with their procedural due process claims. Moreover, an immediate appeal will expedite this litigation. If this Court's ruling is reversed, there will be no need for further proceedings.

SO ORDERED.

Dated: Feb. 11, 2004

/s/
Nancy G. Edmunds
U.S. District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 02-1756/2096

[Filed October 24, 2003]

MICHELLE BAZZETTA, et al.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
KENNETH MCGINNIS, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,	)
	)
Defendants-Appellants.	)

JUDGES: Before: MARTIN and SUTTON, Circuit Judges; MILLS, District Judge.*

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

ORDER

The defendants, The Michigan Department of Corrections and its director (collectively MDOC), appeal two post-judgment orders entered by the district court in this prisoners civil rights case challenging certain Michigan prison visitation regulations. MDOC now moves for peremptory reversal in Case No. 02-1756. The plaintiffs oppose the motion and ask that this matter be remanded to the district court for further consideration. MDOC has filed a reply. In Case No. 02-2096, MDOC moves to hold briefing in abeyance pending further proceedings in the district court. The plaintiffs oppose the motion.

Following a bench trial, the district court entered judgment for the plaintiffs. *Bazzetta v. McGinnis,* 148 F. Supp.2d 813 (2001). MDOC filed a timely appeal which was docketed as Case No. 01-1635. On April 10, 2002, a decision was entered in Case No. 01-1635 affirming the district court's judgment. *Bazzetta v. McGinnis,* 286 F.3d 311 (6th Cir. 2002).

The orders which are the subject of the present appeals were entered in the district court on May 16, 2002, and August 20, 2002. The May 16 order directed MDOC to comply with the terms of the judgment affirmed on appeal in Case No. 01-1635. The August 20 order granted the plaintiff's motion for attorneys fees. The Supreme Court has now issued an opinion reversing this court's decision in Case No. 01-1635. *Overton v. Bazzetta,* 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). On August 28, 2003, an order was entered by this court in Case No. 01-1635 vacating its previous decision and remanding the case to the district court for further consideration in light of the opinion in *Overton.* The order explains that the Supreme Court reversed

this court's decision "holding that certain Michigan prison regulations were invalid on their face," but reserved "any argument that an 'individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards' would pass muster under the First and Eighth Amendments as incorporated by the Fourteenth Amendment."

In seeking peremptory reversal, MDOC argues that the district court's May 16 order of compliance is no longer valid in light of the Supreme Court's opinion in *Overton*. The May 16 compliance order and the August 20 fee award were both premised on the judgment that was appealed in Case No. 01-1635. That case has now been remanded to the district court for further consideration, and we are of the opinion that a remand is also warranted in the present cases. The issues MDOC seeks to raise, *i.e.*, the validity of the May 16 order in light of *Overton* and the plaintiffs' status as a prevailing party, should be considered by the district court in the first instance.

The defendants' motion for peremptory reversal in Case No. 02-1756 is **DENIED.** Case Nos. 02-1756 and 02-2096 are hereby **REMANDED** to the district court for further consideration in light of the Supreme Court's opinion in *Overton v. Bazzetta,* 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). The defendants' motion to hold briefing in abeyance in Case No. 02-2096 is denied as moot.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-1635

[Filed August 28, 2003]

MICHELLE BAZZETTA,	)
STACY BARKER, TONI BUNTON,	)
DEBRA KING, SHANTE ALLEN,	)
ADRIENNE BRANAUGH,	)
ALESIA BUTLER,TAMARA PRUDE,	)
SUSAN FAIR, VALERIE BUNTON,	)
and ARTURO BUNTON,	)
through his next friend Valerie Bunton,	)
on behalf of themselves and all others	)
similarly situated,	)
	)
Plaintiffs-Appellees	)
	)
v.	)
	)
KENNETH McGINNIS,	)
Director of Michigan Department	)
of Corrections and MICHIGAN	)
DEPARTMENT OF CORRECTIONS,	)
	)
Defendants-Appellants.	)
	)

BEFORE: MERRITT, CLAY and GILMAN, Circuit Judges.

ORDER VACATING and REMANDING

In the above-styled case the Supreme Court of the United States on June 16, 2003, reversed the decision of this Court holding that certain Michigan prison regulations were invalid on their face, but also reserving any argument that "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards" would pass muster under the First and Eighth Amendments as incorporated by the Fourteenth Amendment. In light of the Supreme Court's holding in this case, the previous judgment of this Court is vacated and the case remanded to the District Court for further consideration in light of the Supreme Court opinion.

Accordingly, it is so ORDERED.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 02-94

[Filed June 16, 2003]

WILLIAM OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, et al.,

Petitioners

v.

MICHELLE BAZZETTA et al.

JUDGES: Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, O'Connor, Souter, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed a concurring opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Thomas, J., filed an opinion concurring in the judgment, in which Scalia, J., joined.

OPINION

The State of Michigan, by regulation, places certain restrictions on visits with prison inmates. The question before the Court is whether the regulations violate the substantive due process mandate of the Fourteenth Amendment, or the

First or Eighth Amendments as applicable to the States through the Fourteenth Amendment.

I

The population of Michigan's prisons increased in the early 1990's. More inmates brought more visitors, straining the resources available for prison supervision and control. In particular, prison officials found it more difficult to maintain order during visitation and to prevent smuggling or trafficking in drugs. Special problems were encountered with the increase in visits by children, who are at risk of seeing or hearing harmful conduct during visits and must be supervised with special care in prison visitation facilities.

The incidence of substance abuse in the State's prisons also increased in this period. Drug and alcohol abuse by prisoners is unlawful and a direct threat to legitimate objectives of the corrections system, including rehabilitation, the maintenance of basic order, and the prevention of violence in the prisons.

In response to these concerns, the Michigan Department of Corrections (MDOC or Department) revised its prison visitation policies in 1995, promulgating the regulations here at issue. One aspect of the Department's approach was to limit the visitors a prisoner is eligible to receive, in order to decrease the total number of visitors.

Under the MDOC's regulations, an inmate may receive visits only from individuals placed on an approved visitor list, except that qualified members of the clergy and attorneys on official business may visit without being listed. Mich. Admin. Code Rule 791.6609(2) (1999); Director's Office Mem. 1995-59 (effective date Aug. 25, 1995). The list may

include an unlimited number of members of the prisoner's immediate family and ten other individuals the prisoner designates, subject to some restrictions. Mich. Admin. Code Rule 791.6609(2) (1999). Minors under the age of 18 may not be placed on the list unless they are the children, stepchildren, grandchildren, or siblings of the inmate. Rule 791.6609(2)(b); Mich. Comp. Laws Ann. § 791.268a (West Supp. 2003). If an inmate's parental rights have been terminated, the child may not be a visitor. Rule 791.6609(6)(l) (1999). A child authorized to visit must be accompanied by an adult who is an immediate family member of the child or of the inmate or who is the legal guardian of the child. Rule 791.6609(5); Mich. Dept. of Corrections Procedure OP-SLF/STF-05.03.140, p 9 (effective date Sept. 15, 1999). An inmate may not place a former prisoner on the visitor list unless the former prisoner is a member of the inmate's immediate family and the warden has given prior approval. Rule 791.6609(7).

The Department's revised policy also sought to control the widespread use of drugs and alcohol among prisoners. Prisoners who commit multiple substance-abuse violations are not permitted to receive any visitors except attorneys and members of the clergy. Rule 791.6609(11)(d). An inmate subject to this restriction may apply for reinstatement of visitation privileges after two years. Rule 791.6609(12). Reinstatement is within the warden's discretion. *Ibid.*

The respondents are prisoners, their friends, and their family members. They brought this action under Rev Stat § 1979, 42 USC § 1983 [42 USCS § 1983], alleging that the restrictions upon visitation violate the First, Eighth, and Fourteenth Amendments. It was certified as a class action under Federal Rule of Civil Procedure 23.

Inmates who are classified as the highest security risks, as determined by the MDOC, are limited to noncontact visitation. This case does not involve a challenge to the method for making that determination. By contrast to contact visitation, during which inmates are allowed limited physical contact with their visitors in a large visitation room, inmates restricted to noncontact visits must communicate with their visitors through a glass panel, the inmate and the visitor being on opposite sides of a booth. In some facilities the booths are located in or at one side of the same room used for contact visits. The case before us concerns the regulations as they pertain to noncontact visits.

The United States District Court for the Eastern District of Michigan agreed with the prisoners that the regulations pertaining to noncontact visits were invalid. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (2001). The Sixth Circuit affirmed, 286 F.3d 311 (2002), and we granted certiorari, 537 U.S. 1043, 123 S. Ct. 658, 154 L. Ed. 2d 514 (2002).

II

The Court of Appeals agreed with the District Court that the restrictions on noncontact visits are invalid. This was error. We first consider the contention, accepted by the Court of Appeals, that the regulations infringe a constitutional right of association.

We have said that the Constitution protects "certain kinds of highly personal relationships," *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 619-620, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). And outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren

and grandparents. *See Moore v. East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (plurality opinion); *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923).

This is not an appropriate case for further elaboration of those matters. The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977); *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S. Ct. 1475, 149 L. Ed. 2d 420 (2001). And, as our cases have established, freedom of association is among the rights least compatible with incarceration. *See Jones, supra,* at 125-126, 97 S. Ct. 2532, 53 L. Ed. 2d 629; *Hewitt v. Helms,* 459 U.S., 103 S. Ct. 864 460, 74 L. Ed. 2d 675 (1983). Some curtailment of that freedom must be expected in the prison context.

We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners. We need not attempt to explore or define the asserted right of association at any length or determine the extent to which it survives incarceration because the challenged regulations bear a rational relation to legitimate penological interests. This suffices to sustain the regulation in question. *See Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). We have taken a similar approach in previous cases, such as *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974), which we cited with approval in *Turner*. In *Pell*, we found it unnecessary to decide whether an asserted First Amendment right survived incarceration. Prison administrators had reasonably exercised their judgment as to

the appropriate means of furthering penological goals, and that was the controlling rationale for our decision. We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them. *See, e.g., Pell, supra,* at 826-827, 94 S. Ct. 2800, 41 L. Ed. 2d 495; *Helms, supra,* at 467, 103 S. Ct. 864, 74 L. Ed. 2d 675; *Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989); *Jones, supra,* at 126, 128, 97 S. Ct. 2532, 53 L. Ed. 2d 629; *Turner, supra,* at 85, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64; *Block v. Rutherford*, 468 U.S. 576, 588, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984); *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it. *See Jones, supra, at* 128, 97 S. Ct. 2532, 53 L. Ed. 2d 629; *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987); *Shaw, supra,* at 232, 121 S. Ct. 1475, 149 L. Ed. 2d 420. Respondents have failed to do so here.

In *Turner* we held that four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge: whether the regulation has a "'valid, rational connection'" to a legitimate governmental interest; whether alternative means are open to inmates to exercise the asserted right; what impact an accommodation of the right would have on guards and inmates and prison resources; and whether there are "ready alternatives" to the regulation. 482 U.S., at 89-91, 107 S. Ct. 2254, 96 L. Ed. 2d 64.

Turning to the restrictions on visitation by children, we conclude that the regulations bear a rational relation to

MDOC's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury. The regulations promote internal security, perhaps the most legitimate of penological goals, *see, e.g., Pell, supra,* at 823, 94 S. Ct. 2800, 41 L. Ed. 2d 495, by reducing the total number of visitors and by limiting the disruption caused by children in particular. Protecting children from harm is also a legitimate goal, *see, e.g., Block, supra,* at 586-587, 104 S. Ct. 3227, 82 L. Ed. 2d 438. The logical connection between this interest and the regulations is demonstrated by trial testimony that reducing the number of children allows guards to supervise them better to ensure their safety and to minimize the disruptions they cause within the visiting areas.

As for the regulation requiring children to be accompanied by a family member or legal guardian, it is reasonable to ensure that the visiting child is accompanied and supervised by those adults charged with protecting the child's best interests.

Respondents argue that excluding minor nieces and nephews and children as to whom parental rights have been terminated bears no rational relationship to these penological interests. We reject this contention, and in all events it would not suffice to invalidate the regulations as to all noncontact visits. To reduce the number of child visitors, a line must be drawn, and the categories set out by these regulations are reasonable. Visits are allowed between an inmate and those children closest to him or her--children, grandchildren, and siblings. The prohibition on visitation by children as to whom the inmate no longer has parental rights is simply a recognition by prison administrators of a status determination made in other official proceedings.

MDOC's regulation prohibiting visitation by former inmates bears a self-evident connection to the State's interest in maintaining prison security and preventing future crimes. We have recognized that "communication with other felons is a potential spur to criminal behavior." *Turner, supra,* at 91-92, 107 S. Ct. 2254, 96 L. Ed. 2d 64.

Finally, the restriction on visitation for inmates with two substance-abuse violations, a bar which may be removed after two years, serves the legitimate goal of deterring the use of drugs and alcohol within the prisons. Drug smuggling and drug use in prison are intractable problems. *See, e.g., Bell, supra,* at 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447; *Block, supra,* at 586-587, 104 S. Ct. 3227, 82 L. Ed. 2d 438; *Hudson v. Palmer,* 468 U.S. 517, 527, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose. In this regard we note that numerous other States have implemented similar restrictions on visitation privileges to control and deter substance-abuse violations. *See* Brief for State of Colorado et al. as *Amici Curiae* 4-9.

Respondents argue that the regulation bears no rational connection to preventing substance abuse because it has been invoked in certain instances where the infractions were, in respondents' view, minor. Even if we were inclined, though, to substitute our judgment for the conclusions of prison officials concerning the infractions reached by the regulations, the individual cases respondents cite are not sufficient to strike down the regulations as to all noncontact visits. Respondents also contest the 2-year bar and note that reinstatement of visitation is not automatic even at the end of two years. We agree the restriction is severe. And if faced

with evidence that MDOC's regulation is treated as a *de facto* permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case, which challenges the validity of the restriction on noncontact visits in all instances.

Having determined that each of the challenged regulations bears a rational relationship to a legitimate penological interest, we consider whether inmates have alternative means of exercising the constitutional right they seek to assert. *Turner, supra,* at 90, 107 S. Ct. 2254, 96 L. Ed. 2d 64. Were it shown that no alternative means of communication existed, though it would not be conclusive, it would be some evidence that the regulations were unreasonable. That showing, however, cannot be made. Respondents here do have alternative means of associating with those prohibited from visiting. As was the case in *Pell*, inmates can communicate with those who may not visit by sending messages through those who are allowed to visit. 417 U.S., at 825, 94 S. Ct. 2800, 41 L. Ed. 2d 495. Although this option is not available to inmates barred all visitation after two violations, they and other inmates may communicate with persons outside the prison by letter and telephone. Respondents protest that letter-writing is inadequate for illiterate inmates and for communications with young children. They say, too, that phone calls are brief and expensive, so that these alternatives are not sufficient. Alternatives to visitation need not be ideal, however; they need only be available. Here, the alternatives are of sufficient utility that they give some support to the regulations, particularly in a context where visitation is limited, not completely withdrawn.

Another relevant consideration is the impact that accommodation of the asserted associational right would have on guards, other inmates, the allocation of prison resources, and the safety of visitors. *See Turner*, 482 U.S., at 90, 107 S. Ct. 2254, 96 L. Ed. 2d 64; *Hudson, supra,* at 526, 112 S. Ct. 995, 117 L. Ed. 2d 156 (visitor safety). Accommodating respondents' demands would cause a significant reallocation of the prison system's financial resources and would impair the ability of corrections officers to protect all who are inside a prison's walls. When such consequences are present, we are "particularly deferential" to prison administrators' regulatory judgments. *Turner, supra,* at 90, 107 S. Ct. 2254, 96 L. Ed. 2d 64.

Finally, we consider whether the presence of ready alternatives undermines the reasonableness of the regulations. *Turner* does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a *de minimis* cost to the valid penological goal. 482 U.S., at 90-91, 107 S. Ct. 2254, 96 L. Ed. 2d 64. Respondents have not suggested alternatives meeting this high standard for any of the regulations at issue. We disagree with respondents' suggestion that allowing visitation by nieces and nephews or children for whom parental rights have been terminated is an obvious alternative. Increasing the number of child visitors in that way surely would have more than a negligible effect on the goals served by the regulation. As to the limitation on visitation by former inmates, respondents argue the restriction could be time limited, but we defer to MDOC's judgment that a longer restriction better serves its interest in preventing the criminal activity that can result from these interactions. Respondents suggest the duration of the restriction for inmates with substance-abuse violations could be shortened or that it could

be applied only for the most serious violations, but these alternatives do not go so far toward accommodating the asserted right with so little cost to penological goals that they meet *Turner*'s high standard. These considerations cannot justify the decision of the Court of Appeals to invalidate the regulation as to all noncontact visits.

III

Respondents also claim that the restriction on visitation for inmates with two substance-abuse violations is a cruel and unusual condition of confinement in violation of the Eighth Amendment. The restriction undoubtedly makes the prisoner's confinement more difficult to bear. But it does not, in the circumstances of this case, fall below the standards mandated by the Eighth Amendment. Much of what we have said already about the withdrawal of privileges that incarceration is expected to bring applies here as well. Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. *Cf. Sandin v. Conner*, 515 U.S. 472, 485, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). Nor does the regulation create inhumane prison conditions, deprive inmates of basic necessities or fail to protect their health or safety. Nor does it involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Rhodes v. Chapman*, 452 U.S. 337, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981). If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural

safeguards, however, would not support the ruling of the Court of Appeals that the entire regulation is invalid.

* * *

The judgment of the Court of Appeals is reversed.

It is so ordered.

CONCUR: Justice **Stevens,** with whom Justice **Souter,** Justice **Ginsburg,** and Justice **Breyer** join, concurring.

Our decision today is faithful to the principle that "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner v. Safley*, 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). As we explained in *Turner*:

> "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Hence, for example, prisoners retain the constitutional right to petition the government for the redress of grievances, *Johnson v. Avery*, 393 U.S. 483 [89 S. Ct. 747, 21 L. Ed. 2d 718] (1969); they are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment, *Lee v. Washington*, 390 U.S. 333 [88 S. Ct. 994, 19 L. Ed. 2d 1212] (1968); and they enjoy the protections of due process, *Wolff v. McDonnell*, 418 U.S. 539 [94 S. Ct. 2963, 41 L. Ed. 2d 935] (1974); *Haines v. Kerner*, 404 U.S. 519 [92 S. Ct. 594, 30 L. Ed. 2d 652] (1972). Because prisoners retain these rights, 'when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional

rights.' *Procunier v. Martinez*, 416 U.S. 396, 405-406 [94 S. Ct. 1800, 40 L. Ed. 2d 224]." *Ibid.*

It was in the groundbreaking decision in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), in which we held that parole revocation is a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment, that the Court rejected the view once held by some state courts that a prison inmate is a mere slave. *See United States ex rel. Miller v. Twomey*, 479 F.2d 701, 711-713 (CA7 1973). Under that rejected view, the Eighth Amendment's proscription of cruel and unusual punishment would have marked the outer limit of the prisoner's constitutional rights. It is important to emphasize that nothing in the Court's opinion today signals a resurrection of any such approach in cases of this kind. *See ante,* at *Overton v. Bazzetta*, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162, 170 (2003). To the contrary, it remains true that the "restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual." 479 F.2d, at 712.

Justice **Thomas,** with whom Justice **Scalia** joins, concurring in the judgment.

I concur in the judgment of the Court because I would sustain the challenged regulations on different grounds from those offered by the majority.

I

A

The Court is asked to consider "whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments." Brief for Petitioners i. In my view, the question presented, as formulated in the order granting certiorari, draws attention to the wrong inquiry. Rather than asking in the abstract whether a certain right "survives" incarceration, *ante,* at 156 L. Ed. 2d, at 170, the Court should ask whether a particular prisoner's lawful sentence took away a right enjoyed by free persons.

The Court's precedents on the rights of prisoners rest on the implicit (and erroneous) presumption that the Constitution contains an implicit definition of incarceration. This is manifestly not the case, and, in my view, States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations--*provided only that those deprivations are consistent with the Eighth Amendment.* Under this view, the Court's precedents on prisoner "rights" bear some reexamination.

When faced with a prisoner asserting a deprivation of constitutional rights in this context, the Court has asked first whether the right survives incarceration, *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974), and then whether a prison restriction on that right "bears a rational relation to legitimate penological interests." *Ante,* at 156 L. Ed. 2d, at 170 (citing *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987)).

Pell and its progeny do not purport to impose a substantive limitation on the power of a State to sentence a

person convicted of a criminal offense to a deprivation of the right at issue. For example, in *Turner*, the Court struck down a prison regulation that forbade inmates from marrying absent permission from the superintendent. 482 U.S., at 89, 94-99, 107 S. Ct. 2254, 96 L. Ed. 2d 64. *Turner* cannot be properly understood, however, as holding that a State may not sentence those convicted to both imprisonment and the denial of a constitutional right to marry.* The only provision of the Constitution that speaks to the scope of criminal punishment is the Cruel and Unusual Punishment Clause of the Eighth Amendment, and *Turner* cited neither that Clause nor the Court's precedents interpreting it. Prisoners challenging their sentences must, absent an unconstitutional procedural defect, rely solely on the Eighth Amendment.

The proper inquiry, therefore, is whether a sentence validly deprives the prisoner of a constitutional right enjoyed by ordinary, law-abiding, persons. Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 824, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) ("Under our constitutional system, the primary responsibility for defining crimes against state law [and] fixing punishments

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* A prisoner's sentence is the punishment imposed pursuant to state law. Sentencing a criminal to a term of imprisonment may, under state law, carry with it the implied delegation to prison officials to discipline and otherwise supervise the criminal while he is incarcerated. Thus, restrictions imposed by prison officials may also be a part of the sentence, provided that those officials are not acting ultra vires with respect to the discretion given them, by implication, in the sentence.

for the commission of these crimes . . . rests with the States"); *see also Ewing v. California*, 538 U.S. __ ,__ , 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108, 2003 U.S. LEXIS 1952 (2003) *(opinion of O'CONNOR, J.) (slip op., at 12)* ("Our tradition of deferring to state legislatures in making and implementing such important [sentencing] policy decisions is longstanding").

Turner is therefore best thought of as implicitly deciding that the marriage restriction was not within the scope of the State's lawfully imposed sentence and that, therefore, the regulation worked a deprivation of a constitutional right without sufficient process. Yet, when the resolution of a federal constitutional issue may be rendered irrelevant by the determination of a predicate state-law question, federal courts should ordinarily abstain from passing on the federal issue. *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). Here, if the prisoners' lawful sentences encompassed the extinction of any right to intimate association as a matter of state law, all that would remain would be respondents' (meritless, *see* Part II, *infra*) Eighth Amendment claim. Petitioners have not asked this Court to abstain under *Pullman*, and the issue of *Pullman* abstention was not considered below. As a result, petitioners have, in this case, submitted to the sort of guesswork about the meaning of prison sentences that is the hallmark of the *Turner* inquiry. Here, however, *Pullman* abstention seems unnecessary because respondents make no effort to show that the sentences imposed on them *did not* extinguish the right they now seek to enforce. And for good reason.

It is highly doubtful that, while sentencing each respondent to imprisonment, the State of Michigan intended to permit him to have any right of access to visitors. Such access seems entirely inconsistent with Michigan's goal of

segregating a criminal from society, *see Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (incarceration by design intrudes on the freedom "to be with family and friends and to form the other enduring attachments of normal life"); *cf. Olim v. Wakinekona*, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983) (upholding incarceration several hours of flight away from home).

B

Though the question of whether the State of Michigan intended to confer upon respondents a right to receive visitors is ultimately for the State itself to answer, it must nonetheless be confronted in this case. The Court's *Turner* analysis strongly suggests that the asserted rights were extinguished by the State of Michigan in incarcerating respondents. Restrictions that are rationally connected to the running of a prison, that are designed to avoid adverse impacts on guards, inmates, or prison resources, that cannot be replaced by "ready alternatives," and that leave inmates with alternative means of accomplishing what the restrictions prohibits, are presumptively included within a sentence of imprisonment. Moreover, the history of incarceration as punishment supports the view that the sentences imposed on respondents terminated any rights of intimate association. From the time prisons began to be used as places where criminals served out their sentences, they were administered much in the way Michigan administers them today.

Incarceration in the 18th century in both England and the Colonies was virtually nonexistent as a form of punishment. L. Friedman, Crime and Punishment in American History 48 (1993) (hereinafter Friedman) ("From our standpoint, what is most obviously missing, as a punishment [in the colonial system of corrections], is imprisonment"). Colonial jails had

a very limited function of housing debtors and holding prisoners who were awaiting trial. *See id.*, at 49. These institutions were generally characterized by "disorder and neglect." McGowen, The Well-Ordered Prison: England, 1780-1865, in The Oxford History of the Prison: The Practice of Punishment in Western Society 79 (N. Morris & D. Rothman eds 1995) (hereinafter McGowen). It is not therefore surprising that these jails were quite permeable. A debtor could come and go as he pleased, as long as he remained within a certain area ("'prison bounds'") and returned to jail to sleep. Friedman 49. Moreover, a prisoner with connections could get food and clothing from the outside, *id.*, at 50; *see also* W. Lewis, From Newgate to Dannemora: The Rise of the Penitentiary in New York, 1796-1848, p 49 (1965) (hereinafter Lewis) ("Many visitors brought the felons such items of contraband as rum, tools, money, and unauthorized messages"). In sum, "there was little evidence of authority," McGowen 79, uniformity, and discipline.

Prison as it is known today and its part in the penitentiary system were "basically a nineteenth-century invention." Friedman 48. During that time, the prison became the centerpiece of correctional theory, while whipping, a traditional form of punishment in colonial times, fell into disrepute. The industrialization produced rapid growth, population mobility, and large cities with no well-defined community; as a result, public punishments resulting in stigma and shame wielded little power, as such methods were effective only in small closed communities. *Id.*, at 77.

The rise of the penitentiary and confinement as punishment was accompanied by the debate about the Auburn and Pennsylvania systems, both of which imposed isolation from fellow prisoners and the outside. D. Rothman, The

Discovery of the Asylum 82 (1971) (hereinafter Rothman) ("As both schemes placed maximum emphasis on preventing the prisoners from communicating with anyone else, the point of dispute was whether convicts should work silently in large groups or individually within solitary cells"); *id.*, at 95. Although there were several justifications for such isolation, they all centered around the belief in the necessity of constructing a special setting for the "deviant" (*i.e.*, criminal), where he would be placed in an environment targeted at rehabilitation, far removed from the corrupting influence of his family and community. *Id.*, at 71; A. Hirsch, The Rise of the Penitentiary: Prisons and Punishment in Early America 17, 19, 23 (1992); *cf.* Friedman 77 (describing the changing attitudes toward the origin of the crime). Indeed, every feature of the design of a penitentiary--external appearance, internal arrangement, and daily routine--were aimed at achieving that goal. Rothman 79-80; *see also id.*, at 83.

Whatever the motives for establishing the penitentiary as the means of combating crime, confinement became standardized in the period between 1780 and 1865. McGowen 79. Prisons were turned into islands of "undeviating regularity," Lewis 122, with little connection to the outside, McGowen 108. Inside the prisons, there were only prisoners and jailers; the difference between the two groups was conspicuously obvious. *Id.*, at 79. Prisoners' lives were carefully regulated, including the contacts with the outside. They were permitted virtually no visitors; even their letters were censored. Any contact that might resemble normal sociability among prisoners or with the outside world became a target for controls and prohibitions. *Id.*, at 108.

To the extent that some prisons allowed visitors, it was not for the benefit of those confined, but rather to their

detriment. Many prisons offered tours in order to increase revenues. During such tours, visitors could freely stare at prisoners, while prisoners had to obey regulations categorically forbidding them to so much as look at a visitor. Lewis 124. In addition to the general "burden on the convict's spirit" in the form of "the galling knowledge that he was in all his humiliation subject to the frequent gaze of visitors, some of whom might be former friends or neighbors," presence of women visitors made the circumstances "almost unendurable," prompting a prison physician to complain about allowing women in. *Ibid.*

Although by the 1840's some institutions relaxed their rules against correspondence and visitations, the restrictions continued to be severe. For example, Sing Sing allowed convicts to send one letter every six months, provided it was penned by the chaplain and censored by the warden. Each prisoner was permitted to have one visit from his relatives during his sentence, provided it was properly supervised. No reading materials of any kind, except a Bible, were allowed inside. S. Christianson, With Liberty for Some: 500 Years of Imprisonment in America 145 (1998). With such stringent regimentation of prisoners' lives, the prison "had assumed an unmistakable appearance," McGowen 79, one which did not envision any entitlement to visitation.

Although any State is free to alter its definition of incarceration to include the retention of constitutional rights previously enjoyed, it appears that Michigan sentenced respondents against the backdrop of this conception of imprisonment.

II

In my view, for the reasons given in *Hudson v. McMillian*, 503 U.S. 1, 18-19, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) (Thomas, J., dissenting), regulations pertaining to visitations are not punishment within the meaning of the Eighth Amendment. Consequently, respondents' Eighth Amendment challenge must fail.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. 02-94

[Filed December 2, 2002]

WILLIAM OVERTON, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS

v.

MICHELLE BAZZETTA, ET AL.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION

The petition for a writ of certiorari is granted limited to the following Questions: 1. Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments. 2. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections is reasonably related to legitimate penological interests. 3. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

Supreme Court, U.S.
FILED
SEP 7 - 2006
OFFICE OF THE CLERK

No. 05-1572

In the Supreme Court of the United States

MICHELLE BAZZETTA, et al

Petitioners,

v.

PATRICIA L. CARUSO, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Does an incarcerated felon in Michigan have a constitutionally protected liberty interest in prison visitation pursuant to the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

This case involves an eleven-year-old controversy between incarcerated felons, their visitors and the Michigan Department of Corrections ("MDOC"). Petitioners include eleven class representatives, on behalf of themselves and all others similarly situated, including all inmates incarcerated by MDOC and non-incarcerated potential visitors of MDOC inmates. Respondents are the Michigan Department of Corrections and the Director of the Michigan Department of Corrections.

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STATEMENT OF THE CASE

On Jur[illegible], 2003, this Court unanimously reversed the April 10, 2002 Opinion of the United States Court of Appeals for the Sixth Circuit,[1] in its entirety.[2] Rather than repeat the lengthy and complex history in this case, Respondents rely on the factual and procedural background set forth in *Overton*.[3] In its decision, this Court held that MDOC's 1995 prison visitation restrictions, as they pertain to non-contact visits, did not violate the First, Eighth, or Fourteenth Amendments to the United States Constitution. On August 28, 2003, in accordance with this Court's decision, the Court of Appeals vacated its decision affirming the District Court's April 19, 2001 Findings of Fact and Conclusions of Law,[4] and remanded the case back to the lower court for further consideration in light of this Court's decision.[5]

On September 29, 2003, the District Court held a status conference in which Petitioners took the position that the District Court's determination that MDOC's ban on visitation for a minimum of two years for any inmate found guilty of two or more major misconducts for substance abuse violated the Fourteenth Amendment, was still valid in spite of the unanimous reversal by this Court in *Overton*.[6] After the parties briefed the issue, and the District Court heard argument by both sides, the District Court determined that because this Court did not specifically grant Respondents' writ of certiorari on the procedural due process issue, Petitioners' claim of procedural due process violations and the District Court's findings and conclusions on that issue were still valid after *Overton*.[7] With regard to Petitioners' assertion that the District Court had the authority to enforce its May 16, 2002 Order of Compliance in

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[1] *Bazzetta v McGinnis*, 286 F 3d 311 (CA 6 2002).

[2] *Overton v Bazzetta*, 539 US 126 (2003).

[3] *Overton*, 539 US 126.

[4] *Bazzetta v McGinnis*, 148 F Supp 2d 813 (ED Mich 2001).

[5] Pet. App. pp. 30a-31a.

[6] *Overton*, 539 US 126.

[7] *Overton*, 539 US 126.

spite of *Overton*,[8] the District Court agreed with Petitioners' position, and scheduled a conference with Counsel to discuss implementation of specific provisions of the May 16, 2002 Order of Compliance.[9]

Prior to the scheduling conference, Respondents filed a motion requesting an evidentiary hearing in the District Court. In their motion, Respondents argued that in order for the lower court to have the authority to enforce its May 16, 2002 Order of Compliance based on Petitioners' procedural due process argument, it had to find that inmates in Michigan have a liberty interest in prison visitation. Because the District Court's finding that MDOC's substance abuse visitation restriction policy was unique among state prison systems was no longer valid after *Overton*,[10] the District Court's conclusion that MDOC's policy imposed an atypical and significant hardship on inmates, and thus, violated the Fourteenth Amendment, was reversible error. *Sandin v Connor*.[11] Petitioners opposed Respondents' request for an evidentiary hearing by taking the position that incarcerated felons have a liberty interest in prison visitation pursuant to the First Amendment right to intimate association.

The District Court issued an Order Denying Defendants' Motion for Evidentiary Hearing and Certifying Interlocutory Appeal Pursuant to 28 USC § 1292(b).[12] The District Court ruled that Petitioners' procedural due process claim was not barred by *Overton*,[13] because the Supreme Court relied on *Turner v Safley*,[14] which only applies if a constitutional right is at issue. However, the District Court did certify the issue of whether inmates in Michigan have a liberty interest in prison visitation for

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[8] *Overton*, 539 US 126.

[9] Res. App. pp. 17b-32b.

[10] *Overton*, 539 US 126.

[11] *Sandin v Conner*, 515 US 472 (1995).

[12] Pet. App. pp. 24a-26a.

[13] *Overton*, 539 US 126.

[14] *Turner v Safley*, 482 US 78 (1987).

appeal. Respondents' Petition for Permission to Appeal was timely filed pursuant to 28 USC § 1292(b) on February 20, 2004. On March 2, 2004, Petitioners filed their Brief in Opposition to the Petition for Permission to Appeal.

On June 10, 2004, the Court of Appeals entered an Order denying Respondents' Petition for Permission to Appeal as unnecessary and treating the petition as a timely filed notice of appeal pursuant to 28 USC § 1292(a)(1).[15] The Court of Appeals issued its decision reversing the District Court's December 23, 2003 opinion and order that had denied Respondents' motion for summary judgment regarding the procedural due process issue and had granted Petitioners' motion to enforce compliance of the District Court's May 16, 2002 Order of Compliance.[16] As support for its decision, the Court of Appeals noted that, although the Supreme Court did not grant certiorari on the procedural due process issue, based on its analysis of the "unusual" component of the Eighth Amendment's prohibition against cruel and unusual punishment and its determination that MDOC's substance abuse visitation restriction policy at issue was not a "dramatic departure from acceptable standards for conditions of confinement," the Supreme Court implicitly ruled that inmates in Michigan do not have a liberty interest in prison visitation.[17]

Petitioners' Petition for Rehearing with Suggestion for En Banc Review was filed in the Court of Appeals on September 26, 2005. In their petition, Petitioners argued that the Court of Appeals erred when it held that this Court had already addressed the procedural due process issue in *Overton,* and that the *Overton* decision was inconsistent with the District Court's ruling that its May 16, 2002 Order of Compliance was still valid, after this Court's unanimous reversal of the lower courts' decisions in *Overton*. Although it was not included as an issue in Respondents' appeal of right, Petitioners also argued that the

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[15] Pet. App. pp. 21a-23a.

[16] *Bazzetta v McGinnis*, 423 F3d 557 (CA 6 2005). Res. App. pp. 1b-16b.

[17] *Overton*, 539 US 126, and *Sandin*, 515 US 472.

Court of Appeals erred when it did not address the issue of whether minor children can be accompanied by an adult immediate family member of the prisoner or the child. After Respondents filed a response opposing Petitioners' petition, the Court of Appeals issued an Amended Opinion and an Amended Judgment.[18] A review of the Court of Appeals' Amended Opinion reveals that the only substantive change from its September 13, 2005 Opinion was in the conclusion.[19] In its Amended Opinion, the Court of Appeals clarified that this Court's decision in *Overton,*[20] foreclosed Petitioners' procedural due process claim, and therefore, the District Court abused its discretion when it refused to dissolve its May 16, 2002 Order of Compliance. In addition, on that same day, the Court of Appeals issued a letter requesting that Counsel for Petitioners determine whether the Suggestion for En Banc Review be withdrawn.

On December 12, 2005, Petitioners filed a Memorandum of Law in Supplemental Support of En Banc Review. In their Memorandum of Law, Petitioners raised exactly the same issues that they had raised in their September 26, 2005 Petition for Rehearing with Suggestion for En Banc Review.[21] The Court of Appeals' Order denying Petitioners' Suggestion for Rehearing En Banc and their petition for rehearing was entered on March 9,

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[18] *Bazzetta v McGinnis*, 430 F 3d 795 (CA 6 2005). Pet. App. pp. 3a-20a.

[19] *Bazzetta*, 430 F 3d at 805. Pet. App. pp. 20a.

[20] *Overton*, 539 US 126.

[21] In an attempt to find some other basis for complying with the requirement of FRAP 35, Petitioners argued that the panel's September 13, 2005 decision was in conflict with another decision of this Court, *Austin v Wilkinson*, 372 F 3d 346 (CA 6 2004), aff'r in part, rev'd in part, 545 US 209; 125 S Ct 2384; 162 L ED 2d 174 (2005). However, *Austin* involved a liberty interest that was created by Ohio state regulations concerning the placement of a small percentage of inmates -- "the worst of the worst" -- in Ohio's only super maximum facility. In contrast, the Michigan substance abuse visitation restriction policy applies to prisoners generally, unlike the "supermax" condition at issue in *Austin*. There is absolutely no dispute in this case that neither Michigan state statutes nor MDOC's regulations create a liberty interest in prison visitation.

2006.[22] Petitioners' March 14, 2006 Motion to Stay the Mandate was denied by the Court of Appeals on March 24, 2006. This Court denied Petitioners' March 31, 2006 Application for Stay of Mandate by letter on April 5, 2006. Petitioners' Petition for Writ of Certiorari was filed on June 6, 2006.

REASONS FOR DENYING WRIT

As set forth below, this Court has never held that an incarcerated felon has a constitutionally protected liberty interest in prison visitation pursuant to the Fourteenth Amendment of the United States Constitution. In addition, the November 28, 2005 Amended Opinion of the Court of Appeals is not in conflict with a decision of any other courts of appeal. Therefore, the November 28, 2005 Amended Opinion of the Court of Appeals was correct and this Court should deny Petitioners' Petition for Writ of Certiorari.

I. Incarcerated felons in Michigan have no liberty interest in prison visitation.

The Fourteenth Amendment protects an individual from being deprived of life, liberty or property, without du process of law. A due process claim is examined in two steps. First, the Court must first ask whether the individual possess a liberty or property interest which has been interfered with by the State. Second, the Court must ask whether the procedures attendant upon that deprivation were constitutionally sufficient.[23] Thus, in order for the District Court to have the authority to require Respondents to make any changes to their substance abuse visitation restriction policy, it must first find that inmates in Michigan have a liberty interest in prison visitation.

In evaluating claims of constitutional rights by prison inmates, it is important to always bear in mind the special

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[22] Pet. App. pp. 1a-2a.

[23] *Ky Dept of Corrections v Thompson*, 490 US 454, 459-460 (1989) (citing *Hewitt v Helms*, 459 US 460, 472 (1983)).

principles that apply in the unique prison context. Although "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v Safley*,[24] "imprisonment carries with it the circumscription or loss of many significant rights." *Hudson v Palmer*[25] ("prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells"). "The curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, *Wolff v McDonnell*, [418 US 539, 555 (1974)], chief among which is internal security, see *Pell v Procunier*, [417 US 817, 823 (1974)]."[26] "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights," *Pell*.[27] There can be no dispute that inmates retain many of the protections of the First Amendment, such as rights to free expression, *Thornburgh v Abbott*[28]; to petition the government for the redress of grievances, *Johnson v Avery*[29]; and to free exercise of religion, *O'Lone v Estate of Shabazz*.[30] But even "[i]n the First Amendment context . . . some rights are inconsistent with the status of a prisoner," *Shaw v Murphy*,[31] and a prisoner retains only those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[32]

The "ordinary incidents of prison life" include conditions that impair visitation. "[T]he Due Process Clause does not

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[24] *Turner*, 482 US at 84.

[25] *Hudson v Palmer*, 468 US 517, 524, 530 (1984).

[26] *Hudson*, 468 US at 524.

[27] *Pell v Procunier*, 417 US 817, 822 (1974) (quoting *Price v Johnston*, 334 US 266, 285 (1948)).

[28] *Thornburgh v Abbott*, 490 US 401, 407 (1989).

[29] *Johnson v Avery*, 393 US 483 (1969).

[30] *O'Lone v Estate of Shabazz*, 482 US 342, 348 (1987).

[31] *Shaw v Murphy*, 532 US 223, 229 (2001).

[32] *Pell*, 417 US at 822; *Turner*, 482 US at 95.

protect every change in the conditions of confinement having a substantial adverse impact on the prisoner."[33] The Due Process Clause liberty interest of a duly convicted prison inmate is not infringed when he is transferred from one prison to another "for whatever reason or for no reason at all," within the State or to another State, regardless of differing conditions in the prisons.[34] Even a transfer to a maximum security facility with more burdensome conditions is "within the normal limits or range of custody which the conviction has authorized the State to impose."[35] This is true even though such a transfer operates as a "real hardship" on the inmate who is "effectively separated by the transfer from his only contact with the world outside the prison."[36] Analysis of "the nature of the interest involved . . . compels the conclusion" that such a transfer, even with its changed conditions of confinement, "does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself."[37]

In *Meachum v Fano*,[38] this Court explicitly acknowledged that protected liberty interests could spring from two discrete sources. Not only could a state independently establish a protected liberty interest on the basis of State law, but if the conditions of confinement are egregious, a liberty interest could arise from the Due Process Clause itself. Moreover, in *Meachum*,[39] this Court noted that not all changes in conditions of confinement that have a substance adverse impact on prisoners is

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[33] *Sandin*, 515 US at 478.

[34] *Meachum v Fano*, 427 US 215, 228 (1976); *Montanye v Haymes*, 427 US 236 (1976); *Olim v Wakinekona*, 461 US 238 (1983).

[35] *Meachum*, 427 US at 225.

[36] *Montanye*, 427 US at 242, n 4 (quoting from the Court of Appeals decision, 505 F 2d 977, 981 (CA 2 1974)).

[37] *Olim*, 461 US at 248.

[38] *Meachum*, 427 US 215.

[39] *Meachum*, 427 US 215.

sufficient to invoke the protections of the Due Process Clause.[40] Petitioners have not alleged the existence of a State-created liberty interest in prison visitation and, neither Michigan statutes nor Michigan's 1995 prison visitation regulations create such a liberty interest. Therefore, in order for Petitioners to prevail on this issue, this Court would have to find that the Due Process Clause of the Fourteenth Amendment, itself, is the source of a liberty interest with regard to incarcerated felons and prison visitation.

A. In *Overton* this Court held that incarcerated felons have no liberty interest in prison visitation under the Fourteenth Amendment.

In its June 16, 2003 decision, this Court addressed various procedural aspects of MDOC's 1995 visitation restrictions imposed as a result of two or more substance abuse misconducts. Not only did this Court acknowledge that reinstatement of visitation was entirely within the warden's discretion, but it also noted that the substance abuse misconducts at issue may involve "minor" infractions of the rules[41]:

> Respondents argue that the regulation bears no rational connection to preventing substance abuse because it has been invoked in certain instances where the infractions were, in respondent's view, minor. Even if we were inclined, though, to substitute our judgment for the conclusions of prison officials concerning the infractions reached by the regulations, the individual cases respondents cite are not sufficient to strike down the regulations as to all non contact visits. Respondents also contest the 2-year bar and note

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[40] *Meachum*, 427 US at 224. For a good analysis of Supreme Court decisions issued prior to *Sandin*, see: Merolli, Note and Comment, "Atypical and Significant Hardship" Signals the Demise of State-Created Liberty Interests for Prisoners, 15 St. Louis U Pub L Rev 93 (1995).

[41] *Overton*, 539 US 15 134.

> that reinstatement of visitation is not automatic even at the end of two years. We agree the restriction is severe. And if faced with evidence that MDOC's regulation is treated a de facto permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation. Those issues are not presented in this case, which challenges the validity of the restriction on non contact visits in all instances. (Emphasis added).

Thus, it is simply untrue that this Court's decision did not deal with Petitioners' claim that MDOC's 1995 visitation restrictions violated Petitioners' rights to procedural due process. Although the questions presented to this Court for review did not specifically include the procedural due process claim, both parties briefed the issue and this Court reversed the lower courts' rulings that Respondents violated Petitioners' procedural due process rights. In addition, this Court noted that the lower courts' rulings in this case would not support an "individual claim" of a procedural due process violation "based on indefinite withdrawal of visitation."[42]

The Court of Appeals' review of *Overton* in its November 28, 2005 Amended Opinion, reveals that the Court of Appeals was correct when it determined that this Court ruled that MDOC's substance abuse visitation restriction policy did not implicate a liberty interest under the Due Process Clause of the Fourteenth Amendment.[43]

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[42] *Overton*, 539 US at 137. The fact that the Court of Appeals quoted this same language in its August 28, 2003 Order Vacating and Remanding does not change the fact that Petitioners' Third Amended Complaint does not raise "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards." Pet. App. pp. 30a-31a.

[43] *Bazzetta*, 430 F 3d at 795. Pet. App. pp. 3a-20a.

In *Overton* this Court said[44]:

> Much of what we have said already about the withdrawal of privileges that incarceration is expected to bring applies here as well. Michigan, like many other States, uses withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline. This is not a dramatic departure from accepted standards for conditions of confinement. Cf. *Sandin v Connor, 515 U.S. 472, 485, 132 L. Ed 2d 418, 115 S. Ct. 2293 (1995)*. . . . If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations. An individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, however, would not support the ruling of the Court of Appeals that the entire regulation is invalid.

Therefore, the Court of Appeals' November 28, 2005 Amended Opinion was correct in determining that this Court's unanimous reversal of the lower courts' rulings that MDOC's 1995 visitation restrictions violated Plaintiffs' procedural due process rights because the policy was not a dramatic departure from accepted standards for conditions of confinement. Thus, Petitioners' procedural due process claims are without merit and their Petition for Writ of Certiorari should be denied.

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[44] *Overton*, 539 US at 136-137.

B. Incarcerated felons in Michigan have no liberty interest in prison visitation under the Due Process Clause of the Fourteenth Amendment.

In *Ky Dept of Corrections v Thompson*,[45] this Court upheld prison regulations that precluded certain persons from visiting with incarcerated felons, determining that there is no Fourteenth Amendment right to prison visitation.

> Respondents do not argue - nor can it seriously be contended, in light of our prior cases - that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause. We have rejected the notion that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. . . . The denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, *Hewitt v Helms*, 459 US at 468; 74 L Ed 2d 675; 103 S Ct 864, and therefore is not independently protected by the Due Process Clause.[46]

Previously in *Olim v Wakinekona*,[47] this Court held that the transfer of a state prisoner from Hawaii to California did not violate the Due Process Clause and that Hawaii's prison regulations regarding transfers did not create a protected liberty interest under the Fourteenth Amendment. "Respondent's argument to the contrary is unpersuasive. The Court in *Montanye*[48] took note that among the hardships that may result

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[45] *Kentucky*, 490 US at 454.

[46] *Kentucky*, 490 US at 460-461.

[47] *Olim*, 461 US 238.

[48] *Montayne*, 427 US 23.

from a prison transfer are separation of the inmate from home and family, separation from inmate friends, placement in a new and possibly hostile environment, difficulty in making contact with counsel, and interruption of educational and rehabilitative programs. . . . These are the same hardships respondent faces as a result of his transfer from Hawaii to California."[49]

Recently, in *Sandin,* this Court refused to find that any state action taken for a punitive reason encroaches upon a liberty interest protected by the Due Process Clause of the Fourteenth Amendment:

> The punishment of incarcerated prisoners, on the other hand, serves different aims than those found invalid in *Bell* and *Ingraham.* The process does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission. It effectuates prison management and prisoner rehabilitation goals. . . .
>
> Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law.

The exact issue before the Supreme Court in *Sandin* was whether punishment imposed pursuant to Hawaii's regulations regarding prison discipline created a liberty interest protected under the Fourteenth Amendment. The minimum two-year prison visitation ban at issue in this case is also imposed as the result of a prison disciplinary proceeding.[50]

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[49] *Olim*, 461 US at 248.

[50] It should be noted that the Court of Appeals has already determined that MDOC's misconduct hearing process meets the requirements of the Due

In *Sandin*,[51] this Court specifically addressed the question whether disciplinary confinement of inmates itself implicates constitutional liberty interests. The conditions of such confinement were "concededly punitive" but the case "does not present a dramatic departure from the basic conditions of Connor's indeterminate sentence," so the Court held that "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest."[52] "The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected" for one serving such a prison sentence.[53]

The Court of Appeals has not directly addressed the issue of whether an incarcerated felon in Michigan has a constitutionally protected liberty interest in prison visitation pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, in *Spear v Sowders*,[54] the Court of Appeals noted that a person seeking to enter a penal institution to visit an inmate does not have the same constitutional rights as that person would have on a public street or in his or her home. "It is clear that a prisoner does not have a due process right to unfettered visitation. . . . A *fortiori*, a citizen simply does not have a right to unfettered visitation of a prisoner that rises to a constitutional dimension."[55] In addition, the other circuits that have addressed the issue of whether there is a liberty interest in prison visitation have determined that the Due Process Clause of the Fourteenth Amendment does not protect an inmate's right to visitation.[56] "Ware's loss of visitation privileges is within

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Process Clause of the Fourteenth Amendment. *Copeland v Machulis*, 57 F 3d 476 (CA 6 1995).

[51] *Sandin*, 515 US at 485.

[52] *Sandin*, 515 US at 485.

[53] *Sandin*, 515 US at 487.

[54] *Spear v Sowders*, 71 F 3d 626 (CA 6 1995).

[55] *Spear*, 71 F 3d at 629-630 (citations omitted).

[56] *Ware v Morrison*, 276 F 3d 385 (CA 8 2002).

the ordinary incidents of confinement and cannot be considered an atypical and significant hardship. . . . We agree with the Eleventh Circuit in *Caraballo-Sandoval* and we hold that Ware had no constitutionally protected interest implicated by the suspension of his visitation privileges."[57] *See also, Caraballo-Sandoval v Honsted*,[58] where the Eleventh Circuit upheld the denial of visitation for two years to an inmate and his visitor who misled prison authorities about their relationship.

As set forth above, in this case there is absolutely no dispute that MDOC's prison regulations regarding visitation do not create a liberty interest in prison visitation protected by the Fourteenth Amendment. In its February 11, 2004 Order, the District Court determined that MDOC's substance abuse visitation restriction policy must involve a constitutionally protected liberty interest, or this Court's analysis under *Turner*,[59] in *Overton v Bazzetta*,[60] would have been superfluous. As support for its February 11, 2004 Order, the District Court referred to prior decisions of this Court dealing with constitutionally protected liberty interests.[61] However, none of the cases cited by the District Court involved incarcerated felons. This error by the District Court is critical because this Court has repeatedly upheld prison policies that would be unconstitutional if applied to free citizens.[62] A review of prior decisions of this Court involving prisoners reveals that the Court has never held that the Due Process Clause of the Fourteenth Amendment itself creates a constitutionally protected liberty interest in prison visitation.[63] In addition, none of the other circuit courts that have addressed this

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[57] *Ware*, 276 F 3d at 387-388.

[58] *Caraballo-Sandoval v Honsted*, 35 F 3d 521 (CA 11 1994).

[59] *Turner*, 482 US 78.

[60] *Overton*, 539 US 126.

[61] Pet. App. pp. 24a-26a.

[62] *Bd of Regents v Roth*, 408 US 564, 572-73 (1972); *Santosky v Kramer*, 455 US 745 (1982); *Stanley v Illinois*, 405 US 645 (1972); and *Freedman v Maryland*, 380 US 51 (1965).

[63] *Kentucky*, 490 US at 454.

issue have found a liberty interest in prison visitation protected by the Due Process Clause of the Fourteenth Amendment.

Defendants submit that given this Court's holding in *Overton,* that MDOC's substance abuse visitation restriction policy is not a dramatic departure from accepted standards for conditions of confinement. The Court of Appeals' November 28, 2005 Opinion was correct when it determined that incarcerated felons in Michigan have no liberty interest in prison visitation under the Due Process Clause of the Fourteenth Amendment. "Although the substance abuse regulation at issue here is 'severe,' see *Overton*, 539 US 126 at 134, . . . we decline to hold that, on its face, it rises to the level of egregious conduct necessary to implicate the implicit guarantees of the Due Process Clause."[64] This Court also failed to find that incarcerated felons have a liberty interest in prison visitation under the Fourteenth Amendment.[65] Thus, the District Court had no authority to require Defendants to make any changes to MDOC's substance abuse visitation restriction policy. Therefore, the November 28, 2005 Amended Opinion of the Court of Appeals reversing the February 11, 2004 Order of the District Court was correct and this Court should deny Petitioners' Petition for Writ of Certiorari.

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[64] *Bazzetta*, 430 F 3d 795. Pet. App. pp. 3a-20a.

[65] *Overton,* 539 US 126.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted

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Dated: September 2006

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MICHELLE BAZZETTA, et al., Plaintiffs-Appellees, v. KENNETH MCGINNIS, Director of Michigan Department of Corrections; MICHIGAN DEPARTMENT OF CORRECTIONS, Defendants-Appellants.

No. 04-1823

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

June 8, 2005, Argued
September 13, 2005, Decided
September 13, 2005, Filed

COUNSEL: ARGUED: Lisa C. Ward, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellants.

Deborah A. LaBelle, LAW OFFICES OF DEBORAH LaBELLE, Ann Arbor, Michigan, for Appellees.

ON BRIEF: Lisa C. Ward, Leo H. Friedman, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellants.

Deborah A. LaBelle, Patricia A. Streeter, LAW OFFICES OF DEBORAH LaBELLE, Ann Arbor, Michigan, Michael J. Barnhart, Detroit, Michigan, for Appellees.

JUDGES: Before: CLAY and SUTTON, Circuit Judges; OBERDORFER, District Judge. *

* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

OPINIONBY: Louis F. Oberdorfer

OPINION:

OBERDORFER, District Judge. This case marks another chapter in a ten-year controversy between incarcerated felons, their visitors, and the Michigan Department of Corrections ("MDOC"). In 1995, MDOC issued regulations affecting prisoners' visitation privileges, including a permanent ban on virtually all visitation for prisoners found guilty of two or more substance abuse violations. After a bench trial, the district court ruled that MDOC's visitation limitations, including the substance abuse regulation, violated the prisoners' constitutional rights under the *First* and *Eighth Amendments* and their *Fourteenth Amendment* substantive and procedural due process rights. A panel of this court affirmed the district court's judgment and the district court issued an order of compliance enjoining the MDOC from implementing the regulations. The Supreme Court granted the MDOC's petition for certiorari on the prisoners' *First, Eighth* and *Fourteenth Amendment* substantive due process claims and reversed this court's affirmance in *Overton v. Bazzetta, 539 U.S. 126, 156 L. Ed. 2d 162, 123 S. Ct. 2162 (2003)*. The Court did not grant certiorari with respect to the plaintiffs' *Fourteenth Amendment* procedural due process claim, nor otherwise address it directly. On remand, the district court declined to dissolve its injunctive order of compliance, ruling that its procedural due process holding was not disturbed by the Supreme Court's decision.

MDOC appeals the district court's refusal to dissolve the injunction, arguing that although the Supreme Court did not grant certiorari on this court's procedural due process holding, it implicitly foreclosed any facial procedural due process challenges to the substance abuse regulation. Thus, at issue is whether the district court abused its discretion in failing to dissolve its injunctive order in light of *Overton*. For the reasons stated below, we hold that the district court abused its discretion because its procedural due process ruling is inconsistent with *Overton*. Accordingly, we REVERSE the district court's opinion and order denying MDOC's motion for

summary judgment and granting the plaintiffs' motion to enforce compliance. Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship," thus implicating a protected liberty interest.

I. BACKGROUND

In 1995, MDOC issued regulations limiting the visitation rights of prisoners, in part to control the widespread use of drugs and alcohol. *Overton, 539 U.S. at 129-130.* Among other limitations, the regulations authorize the Director of the MDOC to restrict permanently all visits for a prisoner who is found guilty administratively of "two or more violations of the major misconduct charge of substance abuse," *e.g.* possession of narcotics, alcohol, unauthorized prescription drugs, or drug paraphernalia, or for failure to submit to a drug test. *Bazzetta v. McGinnis, 286 F.3d 311, 321 & n.2 (6th Cir. 2002)* (internal quotations omitted). According to the substance abuse regulation, prisoners whose visits have been permanently restricted nevertheless receive visits from "attorneys or [their] representatives, [or] qualified clergy and staff from the Office of the Legislative Corrections Ombudsman . . . ." *Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 833 (E.D.Mich. 2001).* Inmates may also request that the visitation ban be lifted after six months or two years, depending on the underlying infractions. *Id.* Reinstatement of visitation privileges is within the warden's discretion. *Id.*

In August 1995, the plaintiffs, a class of prisoners incarcerated by MDOC, and their prospective visitors, challenged the substance abuse regulation on its face. n1 *Id. at 815.* They asserted that the permanent ban on visitors for two violations of the drug abuse policy: (1) infringed the prisoners' *First Amendment* right of intimate association and was not reasonably related to a valid penological objective; (2) constituted cruel and unusual punishment prohibited by the *Eighth Amendment*; and (3) violated the prisoners' *Fourteenth Amendment* procedural due process rights.*Id. at 845-58.* The case proceeded to a bench trial and, on April 19, 2001, the

district court held that the regulations violated the prisoners' rights under the *First, Eighth* and *Fourteenth Amendments. Id.*

> n1 The Plaintiffs also challenged regulations that: (1) excluded, from family members with whom inmates were entitled to non-contact visits, any minor nieces and nephews and children as to whom parental rights had been terminated; (2) required all children visiting an inmate to be accompanied by a family member or legal guardian; and (3) prohibited former inmates from visiting inmates. These regulations are not the subject of the instant appeal.

In addressing the plaintiffs' procedural due process claim, the court first asked whether Michigan prisoners have a liberty interest in visitation that had been infringed by the substance abuse regulation. *Id. at 857.* The court noted that a liberty interest arises from two distinct sources -- from the implicit guarantees of the *Due Process Clause* itself, or as a result of state action. *Id.* The court addressed only whether the prisoners derive a liberty interest from the state-issued substance abuse regulation. *Id.* Accordingly, it analyzed the regulations under the formulation established by the Supreme Court in *Sandin v. Conner, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995)* -- that a liberty interest arises where the state's regulations impose "freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the *Due Process Clause* of its own force, nonetheless impose[an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id. at 484.*

In determining that the substance abuse regulation imposes an "atypical and significant hardship," the court considered (1) the effect of the restraint on the length of prison confinement; (2) the extent to which the prisoners' confinement is altered from routine prison conditions; and (3) the duration of the restraint. *Bazzetta, 148 F. Supp. 2d at 857* (citing *Jones v. Baker, 155 F.3d 810, 814 (6th Cir. 1998)* (Gilman, J., concurring)). It acknowledged that the regulations do not affect

the length of confinement but found that they create "an unusually harsh and punitive environment for the prisoners restricted." *Id. at 858*. Further, it found significant that the restriction on visitation is permanent -- "although the regulations provide for the possibility of review after two years, there are many instances where no such review occurs, or where reinstatement of privileges after two years is denied." *Id.*

Recognizing a liberty interest in visitation that had been infringed by the permanent visitation ban, the court then asked "'whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Id. at 857* (citing *Hewitt v. Helms, 459 U.S. 460, 472, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983))*. It found many procedural problems with the implementation of the permanent visitation ban -- notably that: (1) there are no written criteria to guide the Director of the MDOC's decision whether to impose the ban, resulting in inconsistent enforcement, *id. at 836-37*; (2) prisoners are not entitled to a hearing on the imposition of the permanent ban or an opportunity to challenge the ban based on unusual or extenuating circumstances, *id. at 838, n.39*; and (3) there are no ascertainable criteria for the restoration of visiting privileges, without any apparent uniform standard being applied, *id. at 839*. The court thus determined that "the inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard are all procedural deprivations of constitutional dimension." *Id. at 858*.

On April 16, 2002, a panel of this court affirmed the district court judgment for the plaintiffs. *Bazzetta v. McGinnis, 286 F.3d 311, 324 (6th Cir. 2002)*. The district court subsequently issued an order of compliance on May 16, 2002, directing MDOC to comply with the terms of the court's judgment and enjoining the Department from enforcing the regulations "or any rule, policy, or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for controlled substance violations." JA 75. In response to the

district court's order, MDOC lifted the regulations on visitation privileges on all inmates subject to the permanent ban. JA 189.

MDOC filed and the Supreme Court granted a petition for certiorari. The Court limited its review, however, to "whether the regulations violate the substantive due process mandate of the *Fourteenth Amendment*, or the *First* or *Eighth Amendments* . . . ." *Overton, 539 U.S. at 128*. On the merits, the Court reversed, ruling that the regulations did not facially infringe the prisoners' *First Amendment* rights of intimate association or violate their *Fourteenth Amendment* substantive due process rights. *Id. at 131-36*. In so holding, the Court stated that it was not implying that "any right to intimate association is altogether terminated by incarceration" but it noted that "we must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id. at 131-32*; *see also id. at 134* ("Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose."). The Court also held that the withdrawal of visitation privileges did not "fall below the standards mandated by the *Eighth Amendment*." *Id. at 137*.

The *Overton* Court did not grant certiorari on the issue of whether the regulations violated the prisoners' procedural due process rights under the *Fourteenth Amendment*. In the context of its *Eighth Amendment* discussion, however, the Court noted that the "withdrawal of visitation privileges for a limited period as a regular means of effecting prison discipline . . . . is not a dramatic departure from accepted standards for conditions of confinement. *Cf. Sandin v. Conner, 515 U.S. 472, 485, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)*." *Id.* The Court admonished that "if the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." *Id. at 137*. It concluded, however, that "an individual claim based on indefinite

withdrawal of visitation or denial of procedural safeguards . . .would not support [a] ruling . . . that the entire regulation is invalid." *Id.*

On August 26, 2003, MDOC moved for peremptory reversal of the district court's order of compliance and dismissal of the case. A panel of this court denied the motion so that the district court could consider the validity of the order in the first instance. *Bazzetta v. McGinnis, 79 Fed. Appx. 161, 2003 WL 22434575, at *1 (6th Cir. 2003).* A separate panel of this court remanded the case to the district court "for further consideration in light of the Supreme Court opinion." *Bazzetta v. McGinnis, 73 Fed. Appx. 842, 2003 WL 22071463, at *1 (6th Cir. 2003).* This panel specifically noted that the Supreme Court preserved "any argument that an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards would pass muster under the *First* and *Eighth Amendments* . . . ." *Id.* (internal quotations omitted).

Meanwhile, MDOC reinstated the regulation permitting permanent visitation restrictions for two major misconduct substance abuse violations, with a few minor revisions. JA 161-62. MDOC voluntarily chose not to reinstate the restrictions on individual prisoners that were removed due to the May 16, 2002 order of compliance. *Id.*

On October 15, 2003, MDOC moved for summary judgment in the district court on the plaintiffs' procedural due process claims. JA 53-77. The plaintiffs countered with a motion to enforce compliance. JA 78-91. On December 23, 2003, the district court denied MDOC's motion for summary judgment, granted the plaintiffs' motion to enforce compliance and confirmed MDOC's obligation to present a proposal to cure the procedural due process violations arising from the imposition of the substance abuse regulation. JA 185-198. The district court acknowledged that MDOC had revised the regulation but found that it failed to correct the significant procedural problems associated with the implementation of the permanent ban on visitation. *Id.* Further, the district court rejected MDOC's mootness claim, holding that "it is well

settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" n2 *Id.* at 189 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 189, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000)* (internal quotations omitted)).

> n2 The court also held that the case was ripe for review because there is no factual development needed to discover how the regulation will be implemented, no indication that the MDOC will change its position regarding the enforcement of the regulation, and the hardship to the prisoners to wait until their visitation rights are revoked is great. JA 190-91.

Despite the district court's December 23, 2003 order, MDOC continued to issue permanent bans on visitation to inmates committing two major misconduct substance abuse violations. On February 11, 2004, upon further motions, the district court issued a supplemental order confirming its December 23, 2003 ruling and denying MDOC's motion for an evidentiary hearing. JA 299-301. The court, however, certified the question of whether its order was fully consistent with the Supreme Court's decision in *Overton* for interlocutory appeal, in accordance with *28 U.S.C. § 1292(b). Id.* at 301.

On February 20, 2004, MDOC petitioned for permission to appeal, representing that the district court had certified the question for review as "whether prisoners have a liberty interest in visitation." A panel of this court denied the petition as unnecessary, holding that MDOC, in reality, was seeking to appeal the district court's "order refusing to dissolve the injunctive relief previously ordered by the court [namely, the May 16, 2002 order of compliance] pursuant to its finding that the plaintiffs' procedural due process rights were violated." JA 328-29. Thus, the panel treated the petition as a notice of appeal pursuant to *28 U.S.C. § 1291(a)(1). Id.* We now entertain that appeal.

II. ANALYSIS

A. Standard of Review for Procedural Due Process Claims

The *Fourteenth Amendment* protects an individual from deprivation of life, liberty or property without due process of law. "Those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Wilkinson v. Austin, 162 L. Ed. 2d 174, 125 S. Ct. 2384, 2393 (2005).* Accordingly, a procedural due process analysis addresses two questions. "The first asks whether there exists a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)* (citations omitted).

In evaluating a claimed liberty interest by prison inmates, courts are mindful that imprisonment necessarily "carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer, 468 U.S. 517, 524, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984).* The "curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, chief among which is internal security." *Id. at 524* (internal citations omitted). Accordingly, not every "action taken for a punitive reason encroaches upon a liberty interest under the *Due Process Clause* . . ." *Sandin, 515 U.S. at 484.*

Prisoners, however, retain a "residuum of constitutionally protected liberty," *Thompson, 490 U.S. at 466* (Marshall, J., dissenting); *see Meachum v. Fano, 427 U.S. 215, 224, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976)* ("Our cases hold that a convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison."), that emanates from two discrete sources: (1) state law can establish a protectible liberty interest, or (2) the Constitution can create a liberty interest when a condition or restraint is so egregious as to implicate the *Due Process Clause* itself. *See Austin, 125 S. Ct. at 2393.*

Here, MDOC argues that the Supreme Court's decision in *Overton* implicitly held that the substance abuse regulation neither creates a protectible liberty interest nor implicates the guarantees of the *Due Process Clause* itself. MDOC claims that because the *Overton* Court foreclosed finding a liberty interest on the face of the regulation, when it determined that it did not constitute a "dramatic departure from acceptable standards for conditions of confinement," *Overton, 539 U.S. at 137*, the district court lacks authority to continue to enjoin its implementation of the substance abuse regulation, absent additional procedural safeguards. Accordingly, MDOC argues, the district court erred in refusing to dissolve its May 16, 2002 order of compliance.

The plaintiffs counter that the Supreme Court did not grant certiorari on the procedural due process issue and, thus, could not have overruled the holding of the district court that the substance abuse regulation established a liberty interest in visitation. In fact, the plaintiffs argue, the *Overton* Court expressly preserved their right to assert an "as applied" challenge to the regulation, such as the one sustained by the district court in this case. Moreover, they contend that even if the Supreme Court's decision foreclosed finding a state-created liberty interest arising from the substance abuse regulation, the prisoners' liberty interest in visitation is implicit in the *Due Process Clause*.

We review a district court's denial of a request to dissolve an injunction for abuse of discretion. *See Pinette v. Capitol Square Review & Advisory Bd., 30 F.3d 675, 678 (6th Cir. 1994), gaff'd, 515 U.S. 753, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995)*. However, a district court's improper application of governing law constitutes an abuse of discretion. *See United States v. Colahan, 635 F.2d 564, 566 (6th Cir. 1980);see also Mascio v. Public Emples. Retirement Sys., 160 F.3d 310, 311 (6th Cir. 1998)* (noting that a district court's decisions on injunctive relief are seldom disturbed unless it relied on clearly erroneous findings of fact, improperly applied governing law, or used an erroneous legal standard).

B. *Overton*'s Implicit Holding

Plaintiffs first argue that the district court did not improperly apply governing law, *i.e. Overton*, by refusing to dissolve its May 16, 2002 injunctive order because the *Overton* Court did not grant certiorari on the procedural due process issue. Further, they claim that nothing in the Court's decision indirectly undermined the district court's finding that the substance abuse regulation violated the prisoners' procedural due process rights. We agree that the Court did not grant certiorari or otherwise expressly address the procedural due process issue. Nonetheless, we find that the Court implicitly ruled on this issue, in a manner inconsistent with the holding of the district court.

In the context of analyzing the "unusual" component of the *Eighth Amendment's* prohibition against cruel and unusual punishment, the *Overton* Court held that the substance abuse regulation was a "regular means of effecting prison discipline" which did not constitute "a dramatic departure from accepted standards for conditions of confinement." This statement is antithetical to the district court's finding a liberty interest in prison visitation because the regulation imposes on prisoners an "atypical" hardship in comparison to the ordinary incidents of prison life. *See supra* page 5.

Furthermore, the *Overton* Court cited *Sandin* in support of its statement that the regulation was not a "dramatic departure." In *Sandin*, the only issue was the prisoners' right to procedural due process protection before placement in segregated confinement for 30 days, imposed as discipline for disruptive behavior. The *Sandin* Court observed that it had previously employed a methodology for identifying state-created liberty interests that emphasized "the language of a particular prison regulation" instead of "the nature of the deprivation." *515 U.S. at 481*. The Court abandoned this methodology, significantly limiting the authority of courts to find liberty interests stemming from positive state law in the prison context. Instead, it stated that the relevant inquiry must focus on the nature of the deprivation imposed on a prisoner, holding that if the

nature of the deprivation does not impose an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life," prisoners will not have a liberty interest in avoiding the deprivation. "Applying this refined inquiry, *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not present a dramatic departure from the basic contours of the conditions of [the inmate's] sentence." *Austin, 125 S. Ct. at 2394* (internal quotations omitted).

We extrapolate from *Overton* and *Sandin* that the substance abuse regulation is neither a "dramatic departure," nor an "atypical and significant hardship" in relation to the ordinary incidents of prison life. Thus, although the issue was not directly before the *Overton* Court, Court precedent and dictum has signaled against our finding a liberty interest on the face of the substance abuse regulation.

C. "As Applied" Procedural Due Process Challenge

The plaintiffs claim, however, that the district court did not rule that the regulation on its face violated the prisoners' procedural due process rights. Instead, they assert, the district court found that the regulation, "as applied" to Michigan prisoners, triggered a state-created liberty interest. Citing the *Overton* Court's language that an individual prisoner could bring a "claim based on indefinite withdrawal of visitation or denial of procedural safeguards," and that "if faced with evidence that MDOC's regulation is treated as a de facto permanent ban on all visitation for certain inmates, we might reach a different conclusion in a challenge to a particular application of the regulation," the plaintiffs maintain that *Overton* expressly preserved their right to bring "as applied" claims.

In arguing that their challenge, as sustained by the district court, does not attack the substance of the regulation, but merely its implementation, the plaintiffs misconstrue both the nature of the district court's ruling and the difference between a facial and as applied procedural due process challenge. The

district court held that the substance abuse regulation, on its face, created a liberty interest because it imposed an "atypical and significant hardship" on all prisoners subject to the restriction. *See Bazzetta, 148 F. Supp. 2d at 858.* While the court cited examples of the treatment of particular inmates in its findings of fact to illustrate what it perceived as the general procedural deficiencies in the implementation of the regulation, *id. at 836-43*, it did not make factual findings as to the application of the regulation to any particular prisoner sufficient to support an as applied procedural due process claim.

As detailed above, the *Overton* Court subsequently foreclosed a facial procedural due process challenge under the standard set forth in *Sandin*. The Court's decision in *Overton* does not preclude individual prisoners from challenging a *particular* application of the substance abuse regulation on *First Amendment*, *Eighth Amendment* or *Fourteenth Amendment* grounds but such "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards, . . . [does] not support the ruling . . . that the entire regulation is invalid." *Overton, 539 U.S. at 137*; *see also Jones v. Baker, 155 F.3d at 816* (Gilman, J., concurring) (noting that *Sandin*'s principal directive is that "courts should look to see if the *particular* inmate has been deprived of a state-created interest of 'real substance' ") (citing *Sandin, 515 U.S. at 478*); *McClary v. Kelly, 4 F. Supp. 2d 195, 199 (W.D.N.Y. 1998)* ("At its core, *Sandin* instructs courts to look at the nature and extent of the particular deprivation in deciding whether a protected liberty interest is implicated.").

D. Implicit Guarantees of Due Process Clause

Finally, the plaintiffs argue that regardless of whether the substance abuse regulation creates a liberty interest, such an interest emanates from the *Due Process Clause* itself because the permanent ban on visitation impinges on the prisoners' constitutional right to intimate association.

III. CONCLUSION

For the foregoing reasons, we hold that the district court abused its discretion in refusing to dissolve its May 16, 2002 order of compliance in light of the decision of the Supreme Court in *Overton*. We REVERSE the district court's December 23, 2003 opinion and order denying MDOC's motion for summary judgment and granting the plaintiffs' motion to enforce compliance and REMAND for further proceedings consistent with this opinion. Our reversal is without prejudice to any claim by an individual prisoner that the regulation, as applied to that prisoner, imposes an "atypical and significant hardship," thus implicating a protected liberty interest.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bazetta, et. al.,

Plaintiffs, Case No. 95-73540

v. Honorable Nancy G. Edmunds

McGinnis, et. al.,

Defendants.
_____/

OPINION AND ORDER (1) DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; (2) GRANTING PLAINTIFFS' MOTION TO ENFORCE COMPLIANCE; AND (3) DENYING DEFENDANTS' MOTION TO PLACE ATTORNEY FEES IN ESCROW

This matter came before the Court on three motions: (1) Defendants' third motion for summary judgment; (2) Plaintiffs' motion to enforce compliance; and (3) Defendants' motion to place attorneys' fees in escrow. Defendants' motion for summary judgment is DENIED because the Supreme Court's ruling in this case did not overturn this Court's judgment as to Plaintiffs' procedural due process claim. Plaintiffs' motion to enforce compliance is GRANTED. Defendants' motion to place attorneys' fees in escrow is DENIED.

I. Factual and Procedural Background

These motions arise out of Plaintiffs' objections to the following Michigan Department of Corrections (MDOC) regulations governing non-contact prisoner visitations:

(a) Mich. Admin. Code Rule § 791.6609(9), defining what persons are in an inmate's immediate family;

(b) Mich. Admin. Code Rule § 791.6609(2), limiting the number of visitors for a prisoner to an approved list of ten, not including immediate family and requiring visitors and immediate family members to be on a prisoner's list of approved visitors;

(c) Mich. Admin. Code Rule 791 .6609(2)(b), (5), and (6), restricting prisoner's access to minors, in that minors under the age of 18 are not permitted to visit unless they are the child, stepchild, or grandchild of the prisoner accompanied by an adult immediate family member or a legal guardian, and prohibiting a child to visit an incarcerated parent if the prisoner parent's rights have been terminated;

(d) Mich. Admin. Code Rule 791.6609(7), prohibiting former prisoners from visiting unless they are the immediate family of a prisoner or unless prior approval for the visit is obtained from the warden of the institution where the visit will occur;

(e) Mich. Admin Code Rule 791.6609(11), permanently banning all visitation (other than attorneys or clergy) for prisoners with two or more major misconduct charges of controlled substance violations.

On April 19, 2001, following a bench trial, this Court granted judgment for Plaintiffs. *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813 (E.D. Mich. 2001). This Court ruled that all of the contested regulations violated the prisoners' First Amendment rights. This Court also held that the last rule, imposing a visitation ban for prisoners with two controlled substance violations, violated the Eight Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's procedural due process requirements. On appeal, the Sixth Circuit affirmed each of these conclusions.

On May 16, 2002, this Court issued an Order of Compliance directing the MDOC to comply with the terms of the Court's judgment, and specifically enjoined the MOOC from enforcing Rule 791.6609(11)(d) or any rule, policy, or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for controlled substance violations.

Following this Court's entry of judgment in favor of Plaintiffs, Plaintiffs moved for attorneys' fees as provided by statute. This Court granted Plaintiffs' motion after the Sixth Circuit affirmed the judgment. The Court granted the motion in two orders: an interim order dated June 27, 2002, which awarded $224,036.92 interim attorney fees, and an order dated August 19, 2002, which awarded the remaining $570,167.35 of requested fees, for a total of $794,204.27. Defendants paid Plaintiffs' attorneys the interim attorney fees, but posted a bond pending appeal of the second award.

The Supreme Court granted Defendants' petition for certiorari, limited to the following three questions:

> 1. Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments.
>
> 2. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests.
>
> 3. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

Overton v. Bazzetta, 123 S. Ct. 658 (2002).

The Supreme Court reversed the Sixth Circuit, ruling that none of the regulations facially violated the prisoners' First Amendment rights, and that the controlled substance violations did not facially violate the prisoners' Eighth Amendment rights. *Overton v. Bazzetta*, 123 S. Ct. 2162 (2003). The Court neither granted certiorari nor actually decided whether the controlled substance regulations violated the prisoners' procedural due process rights.

On August 28, 2003, the Sixth Circuit issued an Order Vacating and Remanding, stating:

> In the above-styled case the Supreme Court of the United States on June 16, 2003, reversed the decision of this Court holding that certain Michigan prison regulations were invalid on their face, but also reserving any argument that "an individual claim based on indefinite withdrawal of visitation or denial of procedural safeguards" would pass muster under the First and Eighth Amendments as incorporated by the Fourteenth Amendment. In light of the Supreme. Court's holding in his case, the previous judgment of this Court is vacated and the case remanded to the District Court for further consideration in light of the Supreme Court opinion.

In light of the Supreme Court's ruling, Defendants moved for the Sixth Circuit to reverse the May 16, 2002 Order of Compliance, but the Sixth Circuit denied their motion so that this Court could consider the validity of the order in the first instance.

II. Analysis

A. Defendants' Third Motion for Summary Judgment

Defendants move for summary judgment on Plaintiffs' procedural due process claims because (1) the Supreme Court implicitly rejected Plaintiffs' procedural due process argument, or in the alternative (2) Plaintiffs' procedural due process claim is moot.

The Supreme Court did not rule on Plaintiffs' due process argument, even though both this Court and the Sixth Circuit held that the permanent ban on visitation in response to two substance abuse violations violated prisoners' procedural due process rights. In fact, the Supreme Court did not grant its writ of certiorari on the due process issue, but instead the only questions before the Court were the First Amendment and Eighth Amendment issues. Therefore, this Court's decision that the regulation violates the prisoners' procedural due process rights is still valid.

Defendants also argue that this Court lacks subject matter jurisdiction over Plaintiffs' due process claims because this Court's May 16, 2002 Order of Compliance enjoined Defendants from enforcing the contested regulation or "any rule, policy or procedure which bans, restricts, prevents or limits visitation based on prior or future misconducts for substance abuse." The MDOC removed all inmates from the visitation restriction list on May 17, 2002. After the Supreme Court's decision, the Department of Corrections reinstated the restriction on visitation based on two substance abuse violations. Defendants conclude that Plaintiffs' claims for injunctive and declaratory relief based on procedural due process violations became moot as of May 17, 2002.

Defendants' temporary lifting of the regulation in compliance with this Court's Order and their subsequent

reinstatement of it does not render this controversy moot. The Supreme Court has held that:

> It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.' ' it did, the courts would be compelled to leave ' defendant. free to return to his old ways.' In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., 528 U.S. 167, 708 (2000) (internal citations omitted).

More specifically, when an official agency removes an offending policy under court order pending an appeal of the lower court's order, the case is not mooted.

> Temporary compliance with a decree pending appeal, for example, clearly should not moot a case, unless other circumstances show that official policies really have changed. It is equally easy to deny mootness if officials who have changed their practices warn that former practices may be resumed at any time, or if officials who have not changed their practices simply argue that they may change some day in the future.

13A Charles Allen Wright et al., Federal Practice and Procedure § 3533.7 (2d ed. 1984). *See also Ammex v. Cox*, ____ F.3d ____, No. 01-2392 (6th Cir. December 3, 2003) (refusing to find that a withdrawn official action mooted the

case). Therefore, Plaintiffs' procedural due process claims regarding the ban on visitation after two substance abuse violations are not moot.

In a case decided on December 3, 2003, the Sixth Circuit held that the Michigan Attorney General's withdrawal of a notice of intent to enforce a statute against the plaintiff did not moot the case, but that the case was no longer ripe. *Ammex v. Cox*, ____ F.3d ____, No. 01-2392 (6th Cir. December 3, 2003). The Court stated: "Where, as in this case, the statute at issue has not been enforced against Ammex, and indeed where a notice of intent to enforce has been explicitly withdrawn, the ripeness doctrine provides the appropriate analysis for determining whether this case should be heard at this time." *Id.* Even though neither party frames the issue as one of ripeness, *Ammex* indicates that it may be the most appropriate framework to analyze this issue.

A court should weigh three factors to determine if an issue is ripe for adjudication:

> One aspect of the "judicial fitness of the issues" is the extent to which the legal analysis would benefit from having a concrete factual context. The second aspect of the "judicial fitness of the issues" is the extent to which the enforcement authority's legal position is subject to change before enforcement. The third consideration deals with the "hardship to the parties of withholding court consideration."

Id.

In *Ammex*, the Sixth Circuit held that all three factors weighed against ripeness. First, the court found that factual development would enhance the court's review of the constitutionality of the challenged statutory scheme.

> Ammex is not challenging a specific rule or finding of the Michigan Attorney General, but rather the general applicability of a statutory scheme to its conduct. Analysis of any preemption or Commerce Clause issue would benefit from knowledge of just what was forbidden by the MCPA, and what the effects of the state's regulation would be on the policies underlying the Interstate and Foreign Commerce Clauses and the federal statutes relied upon by Ammex.

Second, the court found that there was a strong possibility that the agency would change its position, especially since it withdrew its notice of enforcement. Third, the court did not find the hardship to the plaintiff in waiting was strong enough to outweigh the other two factors where there was no threat of criminal liability or huge immediate expense in temporary complying with the challenged statute.

Applying these three factors to the present case, Court concludes that this issue is ripe. First, there is no factual development needed to discover how the regulation will be implemented, since there was a full evidentiary hearing which established how it was implemented in the past. Second, there is no indication that the MDOC will change its position regarding the enforcement of the regulation. Third, hardship to the prisoners to wait until their visitation rights are revoked is great: after the revocation, they will not be permitted any visitors until the parties meander through the legal process. The Court therefore denies Defendants' motion for summary judgment.

B. Plaintiffs' Motion to Enforce Compliance

On August 26, 2003, Defendants issued Director's Office Memorandum 2003-14, which, among other things, reinstated the permanent restrictions for substance abuse violations, stating:

> The Supreme Court decision also allows the Department to again restrict visits for substance abuse misconducts, even if the misconduct is unrelated to a visit. Therefore, in accordance with Paragraph EE of PD 05.03.140, a prisoner who is found guilty of the major misconduct violation of "Substance Abuse" for behavior which occurs on or after August 27, 2003 shall have his/her visits limited to non-contact for 30 days. In addition, Wardens shall recommend to the Director that the visits of a prisoner be permanently restricted in accordance with Paragraphs BBB through EEE of PD 05.03.140 if the prisoner has been found gui1ty of two or more major misconduct violations of "Substance Abuse" which do not arise from the same incidence. Although the Supreme Court decision allows the Department to reinstate restrictions removed due to he (sic) lower courts' rulings, it has been decided that the restrictions will not be reinstated; however, recommendations shall be made to permanently restrict a prisoner's visits if his/her second or subsequent misconduct is based on behavior that occurs on or after September 1, 2003, regardless of when the first misconduct occurred.

(Attached as Supp. to Def. Third Mot. for Summ. J.)

This new DOM requires wardens to recommend a restriction regardless of when the first misconduct occurred. The original rules required both misconducts to have occurred after the rule's effective date. This change creates problems with notice because the first misconduct could have occurred before the rule was imposed, and problems with fairness because there can be years between the first and second substance abuse misconducts.

The new DOM also prohibits imposition of a second violation arising from the same incident. Plaintiffs argue that this new provision does not adequately address the Court's concern that the ban may be imposed for two incidents which were only hours apart and part of the same "pattern of behavior," because it is unclear how the MDOC defines "same incident."

On October 21, 2003, (after these motions were filed) Defendants issued DOM 2003-15, which further modifies the rule imposing visitation restrictions for substance abuse violations. (Attached as Pl. Reply to Def. Resp. in Opp. to Pl. Mot. to Enforce Compliance, Ex. 1.) Plaintiffs claim that the new procedures fail to correct the significant procedural problems associated with the implementation of the permanent ban on visitations in the following ways:

(1) The policy still provides that the warden is to submit the recommendation to impose a permanent ban to the regional prison administrator who, in turn, forwards a recommendation to the deputy director. If the deputy director agrees that the restriction is warranted the recommendation shall be submitted to the director for a final determination. There are no criteria or time limits for the passing on any of the recommendations.

(2) There are no written criteria to guide the director's decision whether or not to impose the restriction.

(3) There is no hearing procedure for a prisoner to challenge the imposition of the ban, and there is no appeal procedure.

(4) DOM 2003-15 prohibits a warden from submitting a recommendation for removal of the restriction if a prisoner has a subsequent substance abuse misconduct or a non bondable misconduct. Thus, the new rule even further limits a warden's discretion. The warden has the discretion not to recommend removal of the restriction for any other reason, and

there are not written standards which establish a basis on which a prisoner can rely to ensure reinstatement.

(5) The new procedure requires that a warden make a recommendation for permanent restriction no more than fourteen days after the second or subsequent substance abuse misconduct guilty finding. Plaintiffs contend that this does not adequately resolve the problem of excessive time between a guilty finding and the imposition of the restrictions because there are no consequences should the warden fail to make the recommendation within fourteen days. There are also no time limits for when the recommendation, which is sent by the warden to the Regional Prison Administrator, must be forwarded from the RPA to the Deputy Director or when the Deputy Director must forward it to the Director and/or when the actual decision must be made by the Director.

This Court previously held that the rule deprived prisoners of their procedural due process rights by the "inconsistency and uncertainty of enforcement, the absence of any criteria for reinstatement, and the failure to provide any opportunity to be heard." 148 F. Supp. 2d at 858. Plaintiffs request the following procedural mechanisms be required to address the Court's procedural due process concerns:

(1) Written substantive criteria for imposing and lifting permanent visiting restrictions that are relevant to the stated purposed of reducing substance abuse;

(2) A clear decision-making process that identifies the official who is actually responsible for making final decisions and insuring the restrictions are applied fairly and consistently;

(3) Time limits on the age of the misconducts that can be used to support a restriction;

(4) Limits on the time that can elapse between the second guilty finding and imposition of the restriction;

(5) Restricting imposition of visitation ban while underlying misconducts are being challenged through the appeal process;

(6) A hearing process before imposition of a permanent restriction to ensure that all criteria are met and no extenuating circumstances exist that warrant waiving the restriction or reducing its severity (e.g. by shortening its length, limiting it to non-contact visits, or limiting it to non-immediate family members), as occurs for individual visitor restrictions pursuant to PD 05.03.140, subsections OO-AAA;

(7) Adequate notice to the prisoner class before any misconduct findings can be used; and

(8) An appeal mechanism for the imposition of a permanent ban on visitation.

Plaintiffs also request that another rule be modified to comply with *Overton v. Bazzetta*. The rule limiting who can bring a child to visit an incarcerated parent states that a child must "be accompanied by an adult immediate family member or legal guardian" without indicating whether the adult must be an immediate family member of the child or the prisoner. The Supreme Court expressly interpreted the rule to permit visits if the child is "accompanied by an adult who is an immediate family member of the child or the inmate."

To ensure that the rules are not in fact inconsistent with the Supreme Court's findings, Plaintiffs request this Court to order Defendants to amend subsection KK of PD 05.03.140 to specify that eligible minor children may be accompanied by an adult who is an immediate family member of either the child or the prisoner.

Defendants contend that *Overton v. Bazzetta* rendered this Court's judgment unenforceable and that the Sixth Circuit recognized in its Order Vacating and Remanding and its

October 24, 2003 Order (denying Defendants' motion to vacate this Court's order of compliance) that this Court's findings of fact and conclusions of law are no longer valid, and therefore cannot be enforced. Those Sixth Circuit orders, however, did not vacate this Court's judgment for Plaintiffs or otherwise render it invalid. Rather, the Sixth Circuit remanded the case to this Court "for further consideration in light of the Supreme Court opinion." (Order Vacating and Remanding at 2.) The Court therefore grants Plaintiffs' motion to enforce compliance and orders a conference with counsel on January 13, 2004 at 3:00 to discuss implementation of specific provisions.

C. Defendants' Motion to Place Attorney Fees in Escrow

On June 27, 2002, this Court ordered Defendants to pay Plaintiffs' "undisputed" interim attorney fees and costs. Defendants did not seek any rehearing of this order nor did they appeal it. It is the money paid pursuant to this order that Defendants move to place in escrow. On August 19, 2002, this Court granted Plaintiffs' Motion for Attorney Fees, awarding $570,167.35 in additional fees. Defendants appealed this second Order, and filed a supersedeas bond for $570,167.35 pending appeal. Following the Supreme Court's decision, the Sixth Circuit remanded the appeal to this Court "for further consideration in light of the Supreme Court's opinion in *Overton v. Bazzetta*, 123 S. Ct. 2162 (2003)." Defendants argued in their briefs that Plaintiffs are not the prevailing parties, and. that the attorney fees awarded to them should be placed in escrow pending final disposition of this matter.

In *Hensley v. Eckerhart*, 416 U.S. 424, 437 (1983), the Supreme Court provided the framework for determining attorney fee awards under Section 1988. First, as a threshold matter, a district court must determine whether the plaintiff is a "prevailing party." In this regard, the *Hensley* Court indicated that "[a] typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in the litigation which

achieves some of the benefit the parties sought in bringing suit'." *Id.* 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). Once plaintiffs have crossed this threshold, they are considered a "prevailing party" within the meaning of Section 1988 and are entitled to a fee award of some kind. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791- 92 (1989). As the Supreme Court explained, "[t]he degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*." *Id.* at 793.

Based on this standard, it is apparent that Plaintiffs remain a prevailing party. They have prevailed on a number of significant issues including the procedural due process violation, their request for injunctive relief, expanded visits for minor children, and recognition of constitutional limits on prisoner visiting restrictions. Given the decision by the Supreme Court, however, it seems that there should be some further consideration of the reasonableness of the attorney fees previously awarded. This issue must be briefed before the Court can rule.

With respect to the issue of escrow, the Court finds such a request to be untimely and unnecessary. Defense counsel missed their opportunity to request that the funds be put in escrow at the outset, and have cited no legal authority to support their argument that nearly eighteen months after money has been paid, the Court can order it into escrow.

The Court orders briefing on the issue of whether the amount of attorneys' fees should be reduced since Defendants prevailed at the Supreme Court on most of the issues (except the procedural due process issue). In reconsidering the attorneys' fees, the Court will consider the entire amount of awarded fees, $794,204.27, not just the limited amount

awarded in the August 19, 2002 appealed order.[1] The Court denies Defendants' motion for escrow.

III. Conclusion

For the reasons stated above, the Court (1) denies Defendants' motion for summary judgment; (2) grants Plaintiffs' motion to enforce compliance; and (3) denies

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[1] Plaintiffs contend that the interim fees paid pursuant to this Court's June 27, 2002 Order cannot now be placed in escrow as those fees were undisputed, Defendants never appealed that Order and that Order is not pending before this Court. Even so, the reasoning supporting the interim fee award was included in Defendants' appeal of the Court's August 19, 2002 Order Granting Plaintiffs' Motion for Attorneys' Fees. That Order granted Plaintiffs' request only as to the total amount requested, $794,204.27, less the amount of the interim award of $224,036.92, which equaled $570,167.35. The Court awarded Plaintiffs the requested $570,167.35. Thus, Plaintiffs are correct that by appealing the August 19, 2002 award of $570,167.35, Defendants did not appeal the interim award of $224,036.92 since that award was not addressed in the Court's August 19, 2002 Order. But to deny any reconsideration of the interim award of attorneys' fees seems overly formalistic.

Defendants' motion to place attorney fees in escrow. The Court orders that counsel appear for a conference on January 13, 2004 at 3:00 to discuss implementation of the Court's prior orders and orders cross briefing on the issue of attorney fees by January 16, 2004.

/s/
Nancy G. Edmunds
U. S. District Judge

Dated: 12/23/03